IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No.

STATE OF ARIZONA, PETITIONER

v.

WILLIAM DALE MANYPENNY, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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INDEX

	Page
Opinions below.	2
Jurisdiction.	2
Questions presented	3
Constitutional and statutory provisions involved	4
Statement	7
Reasons for granting the writ . .	18
Conclusion.	38
Footnotes	39
Appendix A.	1a
Appendix B.	39a
Appendix C.	41a
Appendix D.	58a
Appendix E.	60a

CITATIONS

Cases:

Bolling v. Sharpe, 347 U.S. 491	30
Carter v. Tennessee, 18 F.2d 850.	22,23,24

Cases--continued Page

Kessler v. Department of Public Safety, 369 U.S. 153. . . 27
Marshall v. United States, 414 U.S. 417 30
Martenay v. United States, 216 F.2d 760 45
Maryland v. Soper, 270 U.S. 9. . . 44
Miller v. Kentucky, 40 F.2d 820. 22,23,24
National League of Cities v. Usery, 426 U.S. 833. 25,31
Patterson v. New York, 432 U.S. 197. 27
Rowlette v. United States, 392 F.2d 437 32,33
State of Tennessee v. Davis, 100 U.S. 257 22,23,24
United States v. Allison, 555 F.2d 1385. 39
United States v. Burroughs, 537 F.2d 1156. 39
United States v. Cahalane, 560 F.2d 601 39
United States v. Calloway, 562 F.2d 615 39
United States v. Cravero, 530 F.2d 666 39
United States v. DeGarces, 518 F.2d 1156. 39
United States v. Donahue, 539 F.2d 1131. 39
United States v. Dreitzler, 577 F.2d 539 39
United States v. Helstostki, ____ 61 L.Ed.2d 12, 91 S.Ct. ____, opinion issued June 18, 1979 18,19,21

Cases--continued Page

United States v. Johnson, 487 F.2d 1318, cert. denied, 419 U.S. 825 32,33
United States v. Martin Linen Supply Company, 430 U.S. 564 . . 39
United States v. Rojas, 554 F.2d 938 39
United States v. Rosenson, 291 F.Supp. 867. 45
United States v. Scott, 437 U.S. 82 39
United States v. Sisson, 399 U.S. 267 20,43
United States v. Smith, 331 U.S. 469. 32,33,35,36
United States v. Weinstein, 452 F.2d 704 45
United States v. Wilson, 420 U.S. 332. 18,21
Younger v. Harris, 401 U.S. 37 27,31,40,41

Constitution, statutes and rules:

United States Constitution:

Fifth Amendment. 30
Tenth Amendment. 4

Double Jeopardy Clause 12,15
Due Process Clause 30

18 U.S.C. 3731 . . . . . 3,4,12,18,19 20,21,23,24,29,31,43
28 U.S.C. 1254(1). 3
28 U.S.C. 1291 3,5,24,25

Constitution, statutes and rules--continued

Page

28 U.S.C. 1442(a)(1). 5,30,31

Arizona Revised Statute § 13-249 (A) and (B) 10

Federal Rule of Criminal Procedure 29(c) 4,6,11,32 33,34,36,37

Federal Rule of Criminal Procedure 33. 10,34,36

Federal Rule of Criminal Procedure 34. 10,11

Miscellaneous:

Advisory Committee Note to Federal Rule of Criminal Procedure 54(B)(1). 22,24,40

Rules of the Supreme Court 19.1(B) 18

Declaration of Independence . . .28,42

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The Pima County Attorney, on behalf of the State of Arizona, petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The majority and dissenting opinions of the Court of Appeals, (Appendix A infra 3a-38a) (as amended by the order of the Ninth Circuit on August 13, 1979, Appendix D infra at 58a-59a) are reported at 60__ F.2d at ____. [The original per curiam opinion of the Court of Appeals, (Appendix B infra at 39a-40a) issued July 31, 1978, was withdrawn by the Court of Appeals on July 9, 1979, when the Court of Appeals granted the Petitioner-State's petition for rehearing, and the instant majority and dissenting opinions were substituted.] The order of the district court is reported at 445 F.Supp. 1123 (D. Ariz. 1977) (Appendix C infra at 41a-57a).

JURISDICTION

The judgment of the Court of Appeals (Appendix A infra at 1a-2a) was entered on

July 9, 1979. The State's petition for rehearing and suggestion for rehearing en banc was denied on September 10, 1979 (Appendix E infra at 60a-61a). The time for filing this petition was extended ten days until October 20, 1979 by order of Justice Rehnquist on October 2, 1979. The jurisdiction of this Court is invoked under 28 U.S.C 1254(1).

QUESTIONS PRESENTED

1. Whether a state is stripped of all appellate rights that exist under federal law (18 U.S.C. 3731 and 28 U.S.C. 1291) and applicable state law, when a state criminal prosecution is removed by the defendant to federal court pursuant to 28 U.S.C. 1442(a)(1).

2. Whether a federal district court has jurisdiction to enter a judgment of

acquittal on its own motion eleven months after the jury has returned a guilty verdict, and beyond the seven-day period provided for in Federal Rule of Criminal Procedure 29(c).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Tenth Amendment to the United States Constitution provides:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."

18 U.S.C. 3731 provides in part:

> "In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.

* * *

The provisions of this section shall be liberally construed to effectuate its purpose."

28 U.S.C. 1291 provides:

"The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court."

28 U.S.C. 1442(a)(1) provides:

"(a) A civil action or criminal prosecution commenced in a State court against any of the following persons may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:

(1) Any officer of the United States or any agency thereof, or person acting under him, for any act under color of such office or on account of any right, title or authority

claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue."

Federal Rule of Criminal Procedure 29(c) provides:

"(c) Motion after Discharge of Jury. If the jury returns a verdict of guilty or is discharged without having returned a verdict, a motion for judgment of acquittal may be made or renewed within 7 days after the jury is discharged or within such further time as the court may fix during the 7-day period. If a verdict of guilty is returned the court may on such motion set aside the verdict and enter judgment of acquittal. It shall not be necessary to the making of such a motion that a similar motion has been made prior to the submission of the case to the jury."

STATEMENT

1. On March 15, 1976 at 9:00 p.m. Respondent MANYPENNY was on duty as a United States Border Patrol agent (Tr.* 146, 155, 281). Respondent MANYPENNY, along with Border Patrol Agent Hjelle, were suppose to stop and take into custody illegal aliens entering the United States through a well-known illegal alien route, Sweetwater Pass located within Pima County, Arizona (Tr. 44, 243). Three Mexican males were heading north, seeking work. They had nothing with them but food and clothing (Tr. 15, 23, 294). One of the three aliens, victim Elfego Mendoza, when confronted by Agent Hjelle, turned and ran south along the path back towards the Mexican border (Tr.

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*Tr. refers to reporter's transcript of Respondent's trial.

273, 284). When victim Mendoza was approximately 150 feet south and below where Respondent MANYPENNY was positioned, (Tr. 259) Respondent MANYPENNY fired his shotgun three separate times (Tr. 61, 170, 176, 178). Three twelve-gauge shotgun shells were found within eight inches of one another (Tr. 61-62).

Two of the three shotgun shells contained birdshot, the third shell contained double ought buckshot (Tr. 66). At least one of the two shells containing birdshot hit the victim in the buttocks, causing multiple wounds (Tr. 105-106). One of the pellets from the double ought buckshot shell hit the victim in the back of his neck, (Tr. 55) severing his spinal cord (Tr. 59), turning him into a quadraplegic (Tr. 85, 86).

Respondent MANYPENNY at first claimed his victim had not been shot, but had instead "slipped and fallen" (Tr. 22, 38-39). Later that night, Respondent MANYPENNY suggested that the two other Mexican aliens, who were potential witnesses against him, be deported (Tr. 41).

Two weeks later, Respondent MANYPENNY, with his attorney present, had a conversation with two Pima County Arizona prosecutors, concerning the events surrounding the shooting. At this time Respondent MANYPENNY gave three different versions of why he shot the victim (Tr. 112-120).

At trial, Respondent took the stand and testified that he fired the first shot into the air (Tr. 170); the second shot went off because the gun "misfired" while he was reloading (Tr. 176); the third shot also went off by "accident" (Tr. 178).

Respondent MANYPENNY testified that he knew it was only a misdemeanor to enter the United States illegally (Tr. 123); and that he knew he was not allowed to shoot a misdemeanor offender (Tr. 274, 311).

2. Respondent MANYPENNY was charged by the State of Arizona with Assault With A Deadly Weapon in violation of A.R.S. § 13-249(A) and (B). On Respondent MANYPENNY'S motion, the case was removed to federal court for trial pursuant to 28 U.S.C. § 1442(a)(1). After a trial, on November 6, 1976, the jury returned a verdict of guilty as charged. Respondent MANYPENNY then moved for arrest of judgment, or in the alternative, for a new trial pursuant to Federal Rules of Criminal Procedure 33 and 34. The federal district court granted the Respondent's motion for arrest of judgment. The Petitioner-State

then moved for reconsideration of this ruling. The federal district court granted the State's motion for reconsideration of its ruling, but took no further action for almost one year. On September 8, 1977, Respondent MANYPENNY moved for a hearing to determine the status of the Petitioner-State's pending motion. This hearing was held on September 26, 1977. Two days later, the district court reversed its previous order arresting judgment. The district court, sua sponte, decided to construe Respondent MANYPENNY'S Rule 34 motion for arrest of judgment as a Rule 29(c) motion for judgment of acquittal, despite the fact that Respondent MANYPENNY had never filed a Rule 29(c) motion. The district court then granted its own motion for judgment of acquittal, and held Respondent MANYPENNY not guilty. Arizona v. Manypenny, 445 F.Supp. 1123 (D. Ariz. 1977) (Appendix C infra at 41a-57a).

3. The Petitioner-State then filed a timely notice of appeal pursuant to 18 U.S.C. 3731. The Court of Appeals for the Ninth Circuit originally issued a per curiam opinion (Appendix B infra at 39a-40a) on July 31, 1978, dismissing the Petitioner-State's appeal on double jeopardy grounds despite the fact that the double jeopardy issue had never been briefed by the parties nor mentioned at oral argument. The per curiam opinion read:

> "We assume arguendo that the State of Arizona, in its criminal prosecution which was removed to the federal court, has the same right of appeal under 18 U.S.C. § 3731 as is conferred on the United States in a federal prosecution. On the facts of this case, however, a judgment of acquittal was entered, and that judgment is final and unreviewable. Sanabria v. United States, ____ U.S. ____, 46 U.S.L.W. 4646 (June 14, 1978). Accordingly, the appeal is dismissed." (Ibid. infra at 39a-40a.)

The Petitioner-State then filed a timely petition for rehearing and suggestion for rehearing en banc pointing out to the Court of Appeals that its opinion was in direct conflict with a series of recent United States Supreme Court decisions, and was also in direct conflict with two prior decisions by the Ninth Circuit itself, and also in conflict with every prior decision on this issue by the other Circuits.[1]

4. On July 9, 1979, the Court of Appeals granted the Petitioner-State's petition for rehearing, withdrew its prior opinion and substituted the instant majority and dissenting opinions (Appendix A infra at 1a-38a). The majority, per Judge Choy, acknowledged that:

> "We share the concerns expressed by Judge Kennedy in his dissent that the policy of § 3731, which is designed to 'prevent erroneous trial court rulings from thwarting

> lawful prosecutions,' is equally applicable to state prosecutions and federal prosecutions, and that not allowing state appeals in cases removed to the federal courts under § 1442(a)(1) has a substantial effect on the delicate balance of our federal system." (Ibid. infra at 8a.)

Nonetheless, the majority concluded that:

> ". . . only Congress can authorize an appeal by a state in a § 1442(a)(1) criminal prosecution. Thus far, Congress has not seen fit to do so. Therefore, we hold that we are without jurisdiction to entertain this appeal.
>
> APPEAL DISMISSED." (Ibid. infra at 11a.)

The majority did not reach or discuss the merits of the Petitioner-State's appeal.

Judge Kennedy, in his dissent found that:

> "There are two possible sources of jurisdiction, 18 U.S.C. § 3731 and 28 U.S.C. § 1291." (Ibid. infra at 15a.)

Judge Kennedy's dissent first examined the jurisdictional issue at length and found:

> "I conclude not only that there is jurisdiction, but that the judgment ought to be reversed." (Ibid. infra at 24a.)

Judge Kennedy then considered possible double jeopardy problems posed by the Petitioner-State's appeal and concluded there was no double jeopardy barrier to this appeal (ibid infra at 24a-30a). Turning to the merits of the district court's ruling, Judge Kennedy rejected the Petitioner-State's contention that the district court was without jurisdiction to sua sponte enter a judgment of acquittal eleven months after the jury returned a guilty verdict. Judge Kennedy's dissent noted that:

> "At least two circuits have held that unless a timely motion is filed, the judge lacks jurisdiction to enter a judgment of acquittal. United States v. Johnson, 487 F.2d 1318, 1321 (5th Cir.), cert. denied, 419 U.S. 825 (1974); Rowlette v. United States, 392 F.2d 437, 439 (10th Cir. 1968). See also United States v. Homer, 411 F.Supp. 972, 975 (W.D. Pa.), aff'd on other grounds, 545 F.2d

> 864 (3rd Cir. 1976), cert. denied, 431 U.S. 954 (1977). The defendant did file motions for arrest of judgment and for a new trial within the time limits prescribed by rules 29(c) and 34. The court having retained jurisdiction over the case, I think it had discretion to consider entry of a judgment of acquittal on its own motion, where it was convinced there had been a fundamental error in its instructions, Fed. R. Crim. P. 2.
>
> I conclude further, however, that the trial court misused its discretion in granting a judgment of acquittal." (Ibid. infra at 30a-31a.)

Judge Kennedy's dissent then discussed the merits of the Petitioner-State's appeal and concluded his dissent by stating:

> "I would hold that this court has jurisdiction and reverse and remand." (Ibid. infra at 34a.)

5. On August 13, 1979, the Court of Appeals, acting upon the Petitioner-State's request, issued an order amending the

dissenting opinion to correct a factual error (Appendix D infra at 58a-59a). The opinion of the Court of Appeals (Appendix A infra at 1a-38a) is reproduced in this petition for certiorari as amended by the Court's order of August 13, 1979.

6. The Petitioner-State filed a timely petition for rehearing and suggestion for rehearing en banc, which was denied on September 10, 1979, necessitating the instant petition for a writ of certiorari (Appendix E infra at 60a-61a).

7. On October 2, 1979, Justice Rehnquist, acting on Petitioner's motion, extended the time for filing this petition a period of ten (10) days until October 20, 1979.

REASONS FOR GRANTING THE WRIT

The instant case presents this Court with an opportunity to resolve two questions that fit squarely within the criteria set forth by this Court's Rule 19.1(b) as guidelines governing this Court's exercise of it certiorari jurisdiction.

I.

The majority's interpretation of of 18 U.S.C. 3731 is in conflict with this Court's decisions in United States v. Wilson, 420 U.S. 332, 43 L.Ed.2d 232, 95 S.Ct. 1013 (1975); and United States v. Helstostki, ____ U.S. ____, 61 L.Ed.2d 12, 91 S.Ct. ____ (June 18, 1979). In Wilson, this Court referring to 18 U.S.C. 3731, wrote:

> "While the language of the new Act is not dispositive, the legislative history makes it clear that Congress intended to remove all statutory barriers

to Government appeals and to allow appeals whenever the Constitution would permit." 420 U.S. at 337. (Emphasis added.)

This Court reaffirmed the interpretation of 18 U.S.C. 3731 just this year in United States v. Helstostki, supra. Footnote 6 reads in relevant part:

> "In United States v. Wilson, 420 U.S. 322, 337, 43 L.Ed.2d 232, 95 S.Ct. 1013 (1975), we concluded that the purpose of the section was 'to remove all statutory barriers to Government appeals and to allow appeals whenever the Constitution would permit.' See also United States v. Scott, 437 U.S. 82, 84-84, 57 L.Ed.2d 65, 98 S.Ct. 2187 (1978); HR Conf Rep No. 91-1768, p 21, reprinted in 1970 U.S. Cong Code & Admin News 5842, 5848; S Rep No. 91-1296, pp 2-3 (1970); 116 Cong Rec 35659 (1970) (remarks of Sen. Hruska). There are no constitutional barriers to this appeal and we conclude that the appeal was authorized by § 3731." 61 L.Ed.2d at 22. (Emphasis added.)

Despite the fact that 18 U.S.C. 3731 includes a specific provision reading:

> "The provisions of this section shall be liberally construed to effectuate its purposes."

the majority felt that the use of the term "United States" in 18 U.S.C. 3731 precluded an appeal by a state under the authority of 18 U.S.C. 3731 (Appendix A infra at 7a). This Court's opinion in Wilson does not use the term "United States"; the opinion continually uses the term "Government" when referring to the prosecution.[2]

The majority's interpretation of the legislative intent behind 18 U.S.C. 3731 is also inconsistent with this Court's decision in United States v. Sisson, 399 U.S. 267, 26 L.Ed.2d 608, 90 S.Ct. 2117 (1970). In Sisson, this Court discussed the concerns of Congress that led to the enactment of the predecessor of the current version of 18 U.S.C. 3731:

> "Their primary purpose was perhaps best expressed by Attorney General Miller in his 1892 report: 'As the law now stands . . . it is in the power of a single district judge, by quashing an indictment, to defeat any criminal prosecution instituted by the Government.'" 399 U.S. at 293. (Emphasis added.)

The instant case, as the dissenting opinion of Judge Kennedy points out (Appendix A infra at 17a-18a, 31a) is a case where a valid criminal prosecution, instituted by the government, has been effectively and erroneously blocked by a single district judge. If this Court meant in Sisson, that the concern of Congress was that prosecutions by the United States Government were subject to defeat by a single federal district judge; and if this Court meant in Wilson and Helstostki that the latest amendment to 18 U.S.C. 3731 meant that Congress intended to allow appeals only by the United States Government

"whenever the Constitution would permit", then this case provides an excellent opportunity to clear up these ambiguities.

The majority opinion also conflicts with this Court's decision in State of Tennessee v. Davis, 100 U.S. 257, 25 L.Ed. 648 (1879) (at 271-272) and two Sixth Circuit cases, Carter v. Tennessee, 18 F.2d 850 (6th Cir. 1927); and Miller v. Kentucky, 40 F.2d 820 (6th Cir. 1930). These cases all held that in removal prosecutions, the federal district court is suppose to apply the "substantive" law of the state and federal "procedural" law. The Advisory Committee Note to Federal Rule of Criminal Procedure 54(B)(1) states this in no uncertain terms.[3] The right to appeal is either a "substantive" or "procedural" right; (this is discussed at length in Footnote number 1

of Justice Kennedy's dissent, Appendix A infra at 35a-37a) if this Court deems such right to be "substantive", then Arizona law authorizes this appeal as Judge Kennedy points out (Appendix A infra at 21a, 23a). If this Court deems such right to be "procedural" then Tennessee v. Davis, supra; Carter v. Tennessee, supra; and Miller v. Kentucky, supra, (all cited in the Advisory Committee Note) clearly stand for the proposition that in a removal prosecution the state government stands in the shoes of the United States Government for procedural purposes, and has all the procedural rights of the United States Government, including the right to appeal pursuant to 18 U.S.C. 3731. Irrespective of whether the right to appeal is deemed substantive or procedural, the result reached by the majority is in conflict

with Tennessee v. Davis, Carter and Miller. This case presents an opportunity to review the continuing validity of the principles announced in Tennessee v. Davis in the context of prosecutorial appellate rights, and to resolve the apparent conflict between the Sixth and Ninth Circuits on this issue. It also provides an opportunity for the Court to determine whether the Advisory Committee Note to Rule 54(B)(1) is correct or mistaken.

Assuming arguendo that this Court agrees with the majority's restrictive interpretation of 18 U.S.C. 3731, this case also presents, again as an issue of first impression, the question of whether a state may appeal in a removal prosecution pursuant to 28 U.S.C. 1291. 28 U.S.C. 1291 reads in relevant part:

> "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States. . ."

Judge Kennedy's dissent (Appendix A infra at 18a-22a) found that 28 U.S.C. 1291 provided an alternative basis of jurisdiction for the Court of Appeals to hear the State's appeal.

The majority's ruling that a state is without any appellate rights in a removal prosecution conflicts in principle with many of this Court's recent decisions concerning federalism and the Tenth Amendment.

In National League of Cities v. Usery, 426 U.S. 833, 49 L.Ed.2d 245, 96 S.Ct. 2465 (1976), this Court, per Justice Rehnquist stated:

> "[5] This Court has never doubted that there are limits upon the power of Congress to override state sovereignty, even when exercising its otherwise plenary powers to tax or to regulate commerce which are conferred

by Art I of the Constitution. In Wirtz, for example, the Court took care to assure the appellants that it had 'ample power to prevent . . . "the utter destruction of the State as a sovereign political entity,"' which they feared. 392 U.S. at 196, 20 L.Ed.2d 1020, 88 S.Ct. 2017.

* * *

In Fry, supra, the Court recognized that an express declaration of this limitation is found in the Tenth Amendment:

'While the Tenth Amendment has been characterized as a "truism," stating merely that "all is retained which has not been surrendered," United States v. Darby, 312 U.S. 100, 124, [85 L.Ed. 609, 61 S.Ct. 451, 132 A.L.R. 1430] (1941), it is not without significance. The Amendment expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system.' 421 U.S., at 547 n 7, 44 L.Ed.2d 363, 95 S.Ct. 1792.

* * *

We have repeatedly recognized that there are attributes of

> sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that manner." 426 U.S. at 842-845.

In Kessler v. Department of Public Safety, 369 U.S. 153, 7 L.Ed.2d 641, 82 S.Ct. 807 (1962), this Court wrote:

> "Yet the statute was upheld. Why? Because the 'police power' of a State, especially when exerted for the protection of life and limb, is as pervasive as any of the reserved powers of the States and should be respected unless there is a clear collision with a national law which has the right of way under the Supremacy Clause of Article 6." 369 U.S. at 172.

See also, Patterson v. New York, 432 U.S. 197, 53 L.Ed.2d 281, 97 S.Ct. 2319 (1978) at 201-202.

In Younger v. Harris, 401 U.S. 37, 27 L.Ed.2d 669, 91 S.Ct. 746 (1971), this Court stated:

> "Since the beginning of this country's history Congress has, subject to a few exceptions, manifested a desire to permit state courts to try state cases free from interference by federal courts." 401 U.S. at 43.[4]

As Justice Kennedy's dissent points out:

> "My concern with the majority's approach is that as well as producing an anomalous result, it creates serious and difficult problems of federalism. In effect the majority opinion holds that through removal, a state cannot only be deprived of jurisdiction to try a case in its own courts, it can also be completely deprived of any right to appeal that would have existed under state law." (Appendix A infra at 16a-17a.)

The result reached by the majority is inconsistent with federalism and the intent of the founding fathers as manifested both in the Constitution and the Declaration of Independence.[5]

Wholly apart from the question of federalism, the majority opinion has inad-

vertently created a potentially grave problem for the orderly administration of justice in the federal courts; the right of the United States Government to appeal pursuant to 18 U.S.C. 3731 cannot survive the majority's interpretation of the Congressional intent behind its passage. The majority wrote:

> "In conclusion, only Congress can authorize an appeal by a state in a § 1442(a)(1) criminal prosecution. Thus far Congress has not seen fit to do so. Therefore, we hold that we are without jurisdiction to entertain this appeal." (Appendix A infra at 11a.)

The majority has ruled that Congress created two distinct classes of criminal defendants in federal court: (1) the ordinary federal defendant, who is subject to an appeal by the prosecution pursuant to 18 U.S.C. 3731 to challenge erroneous rulings in favor of the defendant by the district

court; and (2) federal employees entitled to removal under 28 U.S.C. 1442(a)(1) who now constitute a special "privileged class", free to enjoy the benefits of errors committed in their favor by the federal district court without any possibility of review. Congress cannot set up such a statutory scheme consistent with the Equal Protection guarantee that is embodied in the Due Process Clause of the Fifth Amendment. Bolling v. Sharpe, 347 U.S. 491, 98 L.Ed.2d 884, 74 S.Ct. 693 (1954); C.F. Marshall v. United States, 414 U.S. 417, 38 L.Ed.2d 618, 94 S.Ct. 700 (1974).

Unless someone can think up a "rational basis" for allowing criminals who are employed by the Federal Government these special privileges, the Equal Protection rights of the ordinary federal defendant are violated every time the United States

Government files an appeal under 18 U.S.C. 3731.

The majority's ruling also calls into question the continuing constitutionality of the removal statute itself (28 U.S.C. 1442(a)(1)) for the reasons set forth by this Court in National League of Cities v. Usery, supra; and Younger v. Harris, supra.

This case allows the Court an opportunity to forestall these issues from arising in the lower courts by either reversing the majority, or taking the case as an opportunity to explain why the majority's ruling does not violate the Equal Protection rights of the ordinary federal defendant who has been subjected to a successful government appeal under 18 U.S.C. 3731.

II.

The second question presented for review, (whether a federal district judge has jurisdiction to enter a judgment of acquittal on his own motion beyond the seven-day limit called for in Federal Rule of Criminal Procedure 29(c)) presents this Court with an opportunity to resolve an apparent conflict[6] between the Ninth Circuit and the position taken by both the Fifth Circuit in United States v. Johnson, 487 F.2d 1318, cert. denied, 419 U.S. 825 (1974) and the Tenth Circuit in Rowlette v. United States, 392 F.2d 437 (1968). The apparent position (see Footnote 6 infra at 43) of the Ninth Circuit on this issue also conflicts in principle with this Court's decision in United States v. Smith, 331 U.S. 469, 67 S.Ct. 1330, 91 L.Ed.2d 1610 (1947).

Federal Rule of Criminal Procedure 29(c) reads in relevant part:

> "(c) Motion after discharge of Jury. If the jury returns a verdict of guilty or is discharged without having returned a verdict, a motion for judgment of acquittal may be made or renewed within 7 days after the jury is discharged or within such further time as the court may fix during the 7-day period."

The Fifth Circuit in Johnson, supra, and the Tenth Circuit in Rowlette, supra, have both held that a trial court is without jurisdiction to consider a Rule 29(c) motion unless it is timely filed within the seven-day period. As Judge Kennedy noted in his dissent, no such motion was ever filed by Respondent MANYPENNY (Appendix A infra at 30a).

In United States v. Smith, supra, this Court ruled that the government was entitled to have its writ of mandamus granted

to require the vacation of an order by a federal district judge granting the defendant a new trial pursuant to Federal Rule of Criminal Procedure 33. The new trial was granted on the Court's own motion beyond the five-day limit for such motions allowed by Rule 33 at that time. (Rule 33 has subsequently been amended to provide for the same seven-day limit that exists in Rule 29(c).) This Court stated per Justice Jackson:

> "Briefly, Judge Smith thought and intervenor argues that the rule prevents a defendant from asking the court to grant a new trial after the times specified, but that it permits the judge to order retrial without request and at any time. The result, in view of annulment of the term limitation, would be that the power of the trial court to grant new trials on its own motions lingers on indefinitely. There are several reasons why this construction of the Rules is not acceptable.
>
> * * *

> We think that expiration of the time within which relief can openly be asked of the judge, terminates the time within which it can properly be granted on the court's own initative.
>
> * * *
>
> But the extension of that time indefinitely is no insurance of justice. On the contrary, as time passes, the peculiar ability which the trial judge has to pass on the fairness of the trial is dissipated as the incidents and nuances of the trial leave his mind to give way to immediate business. It is in the interest of justice that a decision on the propriety of a trial be reached as soon after it has ended as is possible, and that decision be not deferred until the trial's story has taken on the uncertainty and dimness of things long past." 331 U.S. at 473-476. (Emphasis added.)

If this Court reads the Smith case as applying to all the "Rules", then the decision of the Ninth Circuit is in direct conflict with Smith. If this Court views the Smith case as controlling authority

only as to Rule 33, then this case provides an excellent opportunity for the Court to decide if the Smith Rule should apply to Rule 29(c) also. In the instant case, the trial court, eleven months after the trial, without the benefit of any transcripts, sua sponte entered a judgment of acquittal. The comparison of the reasons advanced by the district court for its action (Appendix C infra at 52a-57a) and the actual trial transcript reveals that the fears expressed by this Court in the Smith case ("uncertainty and dimness of things long past") have indeed come to pass in the instant case. As Judge Kennedy pointed out in his dissent:

> "I conclude further, however, that the trial court misused its discretion in granting judgment of acquittal. The court's ruling was based on the premise that the evidence was insufficient to overcome a defense of immunity under

> Clifton v. Cox, supra. The defense of immunity was not raised or argued at all at trial. The defendant had the burden of raising immunity as an affirmative defense but did not do that." (Appendix A infra at 30a-31a.)

The proper time limitation for granting judgments of acquittal pursuant to Rule 29(c) is an important question affecting the day to day operation of the federal courts and this Court should resolve this issue.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted this 9th day of October, 1979.

STEPHEN D. NEELY
PIMA COUNTY ATTORNEY

Daniel Jesse Smith
Deputy County Attorney

FOOTNOTES

1/ The July 31, 1978 per curiam opinion of the Ninth Circuit was in direct conflict with this Court's decisions in the following cases: United States v. Wilson, 420 U.S. 332, 43 L.Ed.2d 232, 95 S.Ct. 1013 (1975); United States v. Martin Linen Supply Company, 430 U.S. 564, 51 L.Ed.2d 642, 97 S.Ct. 1349 (1977); United States v. Scott, 437 U.S. 82, 57 L.Ed.2d 65, 98 S.Ct. 2187, reh. denied, 58 L.Ed.2d 197, 99 S.Ct. 226 (1978) footnote 7. The July 31, 1978 opinion was also in direct conflict with two prior Ninth Circuit Opinions: United States v. Rojas, 554 F.2d 938 (1977); and United States v. Dreitzler, 577 F.2d 539 (June 23, 1978). The opinion was also in conflict with every other Circuit that had passed on the issue: United States v. De Garces, 518 F.2d 1156 (2nd Cir. 1975); United States v. Cahalane, 560 F.2d 601 (3rd Cir. 1977); United States v. Burroughs, 537 F.2d 1156 (4th Cir. 1976); United States v. Cravero, 530 F.2d 666 (5th Cir. 1976); United States v. Allison, 555 F.2d 1385 (7th Cir. 1977); United States v. Donahue, 539 F.2d 1131 (8th Cir. 1976); United States v. Calloway, 562 F.2d 615 (10th Cir. 1977).

2/ The majority opinion per Justice Marshall refers to the prosecution as the "Government" thirty-nine times in his majority opinion, and only uses the term "United States" one time, (420 U.S. at 338) to refer to the prosecution. The dissent uses the term "Government" six times and never uses the term "United States" except in citing the names of previous cases.

3/ The Advisory Committee note to Federal Rule of Criminal Procedure 54B(1) reads in relevant part:

> "In such cases the Federal court applies the substantive law of the State, but follows Federal procedure; State of Tennessee v. Davis, 100 U.S. 257, 25 L.Ed. 648; Carter v. Tennessee, 18 F.2d 850, C.C.A.6th; Miller v. Kentucky, 40 F.2d 820 C.C.A.6th. See, also, State of Maryland v. Soper, 46 S.Ct. 185, 270 U.S. 9, 70 L.Ed. 449. The rule is, therefore, a restatement of existing law, except that it does not affect whatever power the State prosecutor may have as to dismissal.

4/ This Court went on to state in Younger:

> "This underlying reason for restraining courts of equity from interferring with criminal prosecutions is reinforced by an even more vital consideration, the notion of 'comity,' that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their

separate ways. This, perhaps for lack of a better and clearer way to describe it, is referred to by many as 'Our Federalism,' and one familiar with the profound debates that ushered our Federal Constitution into existence is bound to respect those who remain loyal to the ideals and dreams of 'Our Federalism.' The concept does not mean blind deference to 'States' Rights' any more than it means centralization of control over every important issue in our National Government and its courts. The Framers rejected both these courses. What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious through it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States. It should never be forgotten that this slogan, 'Our Federalism,' born in the early struggling days of our Union of States, occupies a highly important place in our Nation's history and its future." 401 U.S. at 44-45.

5/ Indeed, one of the enumerated grievances listed in the Declaration of Independence was a situation remarkably similar to the instant case. The Declaration reads in relevant part:

> "The history of the Present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these states:"

The Declaration then goes on to list a series of enumerated grievances, among them:

> ". . . For Protecting them, by a Mock trial, from punishment for any murders which they should commit on the inhabitants of these states. . ."

In the instant case, the same Federal District Court that erroneously granted Respondent's motion in arrest of judgment (Appendix C infra at 43a, 57a) and then sua sponte entered a judgment of acquittal eleven months after the guilty verdict, made the following comment prior to the trial in the instant case. (This was at the hearing on a motion brought by the Respondent-Defendant prior to trial to force the United State's Attorney's Office to defend him in the instant case. The United States Attorney opposed the motion, which was denied.)

"THE COURT

* * *

Now, just what do you think that this sort of conduct by the Department of Justice in failing to come to the aid of a Border Patrol agent is going to do to the morale of your law enforcement agents?" Transcript of August 30, 1976, page 9.

Respondent MANYPENNY has yet to spend one day in jail for twice shooting Elfego Mendoza in the back, crippling him for life, as Mendoza ran south, unarmed, towards the Mexican border. On this record, the instant case presents a classic example of what this Court said Congress was concerned with when it enacted 18 U.S.C. 3731 and its predecessors. (See United States v. Sisson, supra.) For all intents and purposes, the people of the State of Arizona have received little more than the "mock" trial listed as one of the enumerated grievances in the Declaration of Independence. To say the majority opinion would cause some consternation among the founding fathers is probably an understatement.

6/ The majority opinion does not mention this issue although it was properly raised by the Petitioner-State before the Ninth Circuit as Judge Kennedy noted in his dissent (Appendix A infra at 30a). The dissent discussed this issue and rejected the position of the Fifth and Tenth

Circuits. The majority opinion has implicitly rejected the position taken by the other Circuits when it dismissed the State's appeal outright, rather than construing it as a Petition For Mandamus pursuant to 28 U.S.C. 1651. Assuming arguendo that the State has no right to appeal in a removal prosecution, if the district court was without jurisdiction to enter the judgment of acquittal, then the Court of Appeals, and this Court both have jurisdiction by way of mandamum (28 U.S.C. 1651) to order the district court to reinstate the verdict.

In Maryland v. Soper, 46 S.Ct. 185, 270 U.S. 9, 70 L.Ed. 449 (1925), this Court reviewed Maryland's challenge to the granting of a removal petition by a Federal District Court. This Court per Chief Justice Taft, granted the State's Petition For Mandamus. In discussing the use of this extraordinary remedy, the Chief Justice wrote:

> "Virginia v. Rives, 100 U.S. 313, Virginia v. Paul, 148 U.S. 107, and Kentucky v. Powers, 201 U.S. 1, were cases in which criminal prosecutions by a State, removed to a federal court under asserted compliance with federal statutes, were ordered remanded by writ of mandamus.

* * *

> The writ in those cases was justified by the Court because of the gross abuse of discretion of the lower court, its clear lack of jurisdiction, and the absence of any other remedy. Ex parte Harding, 219 U.S. 363, at p. 373.
>
> * * *
>
> In respect of the removal statute prosecutions, there should be a more liberal use of mandamus than in removal of civil cases. 220 U.S. at 28.

See also, United States v. Weinstein, 452 F.2d 704 (2nd Cir. 1971).

The Petitioner-State did not formally request mandamus relief from the Court of Appeals; it being the position of the State below and in this Court that the State has a right to an appeal. The Petitioner-State, as Justice Kennedy noted supra, did raise and brief this issue, alleging that the District Court was wholly without jurisdiction to even enter a judgment of acquittal. It is the substance and not the label of pleadings that are controlling. See United States v. Rosenson, 291 F.Supp. 867 (E.D. Louisiana 1968); and Martenay v. United States, 216 F.2d 760 (10th Cir. 1954). By failing to order the verdict reinstated, the majority has effectively created a conflict with the other Circuits on this issue.

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

STATE OF ARIZONA,	)	
	)	
Plaintiff-Appellant,	)	No. 77-3453
	)	
vs.	)	ORDER
	)	
WILLIAM DALE MANYPENNY,	)	
	)	
Defendant-Appellee.	)	
	)	
	)	

Filed: July 9, 1979, Emil E. Melfi, Jr.
Clerk, U.S. Court of Appeals

Before: CHOY and KENNEDY, Circuit Judges, and HALL,* District Judge

The petition of the State of Arizona for a rehearing of this appeal is granted; and the original per curiam opinion of the court entered herein on July 31, 1978 is withdrawn and there is substituted in its place the attached opinion and dissenting opinion.

*The Honorable Peirson M. Hall, Senior United States District Judge for the Central District of California, sitting by designation.

The State's suggestion for rehearing en banc is rejected, all active members of the court having been advised of the petition for rehearing and suggestion for rehearing en banc and no member of the court having indicated a desire for rehearing en banc.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

STATE OF ARIZONA,	)	
	)	
Plaintiff-Appellant,	)	No. 77-3453
	)	
vs.	)	OPINION
	)	
WILLIAM DALE MANYPENNY,	)	
	)	
Defendant-Appellee.	)	
	)	
	)	

Appeal from the United States District Court for the District of Arizona

Before: CHOY and KENNEDY, Circuit Judges, and HALL,* District Judge

CHOY, Circuit Judge:

The State of Arizona brought this criminal prosecution against Manypenny, a border patrolman of the United States Immigration and Naturalization Service.

*The Honorable Peirson M. Hall, Senior United States District Judge for the Central District of California, sitting by designation.

The State charged Manypenny with assault with a deadly weapon in violation of Arizona law. Ariz. Rev. Stat. § 13-249(A) & (B). On Manypenny's motion, the case was removed to federal court. See 28 U.S.C. § 1442(a)(1).[1/]

After trial, the jury returned a verdict of guilty. Manypenny then moved for arrest of judgment or, alternatively, for a new trial. See Fed.R.Crim.P. 33, 34. The court granted the Rule 34 motion for arrest of judgment. Thereafter, the State moved for reconsideration of the grant of the Rule 34 motion. The court granted the motion for reconsideration, but no action was taken for a year.

On September 8, 1977, Manypenny moved for a hearing to determine the status of the State's pending motion. The hearing was held on September 26. Two days

later, the district court reversed its previous order arresting judgment. The court construed Manypenny's Rule 34 motion to be a motion for judgment of acquittal under Fed.R.Crim.P. 29(c), granted the motion for acquittal, set aside the jury's verdict and held Mannypenny not guilty. Arizona v. Manypenny, 445 F.Supp. 1123 (D. Ariz. 1977).[2/]

The State appeals from these rulings. We find that we are without jurisdiction to entertain such an appeal. We therefore dismiss the appeal.

It is well-settled that the prosecution has no right to appeal an adverse decision absent some statutory authorization. See United States v. Martin Linen Supply Co., 430 U.S. 564, 568 (1977); United States v. Wilson, 420 U.S. 332, 336 (1975); United States v.

Sanges, 144 U.S. 310, 312, 318-23 (1892).[3/] The State contends that it may appeal the judgment in this case under 18 U.S.C. § 3731, the Criminal Appeals Act.

Section 3731 provides in part:

> "In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.
>
> . . . .
>
> The provisions of this section shall be liberally construed to effectuate its purposes." (Emphasis added.)

While the Supreme Court has stated that § 3731 was "intended to remove all statutory barriers to Government appeals and to allow appeals whenever the Constitution would permit," United States v. Martin

Linen Supply Co., 430 U.S. at 568, quoting United States v. Wilson, 420 U.S. at 337, it is manifest that § 3731 is limited by its own terms to appeals by the United States as a prosecuting entity. The statute authorizes "an appeal by the United States," not an appeal by a state or by "any of the United States." As we have previously stated, "'[t]he language of a statute is the best and most reliable index of its meaning, and where the language is clear and unequivocal it is determinative of its construction.'" Smith v. Califano, No. 77-1296 (9th Cir. Mar. 8, 1979), slip op. at 709, quoting, Monte Vista Lodge v. Guardian Life Insurance Co., 384 F.2d 126, 128 (9th Cir. 1967), cert. denied, 390 U.S. 950 (1968).

We note that no court has ever interpreted § 3731 as providing for appeals

by a state in a § 1442(a)(1) prosecution. Moreover, the legislative history of this provision and its predecessors make it clear that Congress was only concerned with appeals by the federal Government. 4/

We share the concerns expressed by Judge Kennedy in his dissent that the policy of § 3731, which is designed to "prevent erroneous trial court rulings from thwarting lawful prosecutions," is equally applicable to state prosecutions and federal prosecutions, and that not allowing state appeals in cases removed to the federal courts under § 1442(a)(1) has a substantial effect on the delicate balance of our federal system. However, we cannot rewrite § 3731 for Congress. As the Supreme Court has warned:

> "A statute "is not an empty vessel into which this Court is free to pour a vintage that

> we think better suits present day tastes.' United States v. Sisson, 399 U.S. 267, 297 (1970). Considerations of this kind are for Congress, not the courts."

National Broiler Marketing Association v. United States, 46 U.S.L.W. 4620, 4623 (U.S. June 12, 1978), quoted in Smith v. Califano, slip op. at 712.

Neither can we look to state law as providing Arizona with a right to appeal in this case. A case before the federal courts under § 1442(a)(1) is one within the judicial power of the United States, for it arises under federal law. See Tennessee v. Davis, 100 U.S. 257, 262-65 (1879). In a case arising under federal law, federal law, rather than state law, controls. See D'Oench, Dune & Co. v. FDIC, 315 U.S. 446, 456 (1942); Deitrick v. Greaney, 309 U.S. 190, 200-01 (1940); Board of County Commissioners v. United States,

308 U.S. 353, 349-53 (1939); United States v. Crain, 589 F.2d 996, 998 (9th Cir. 1979).

While in certain cases the federal courts may adopt state law as federal law, see Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 457 (1957); D'Oench, Duhme & Co. v. FDIC, 315 U.S. at 468-72 (Jackson, J., concurring); Board of Commissioners v. United States, 308 U.S. at 349-52; United States v. Crain, 589 F.2d at 999-1000, adoption of state law in this case does not aid the State's case. As previously noted, the prosecution may appeal only where authorized to do so by statute. See United States v. Martin Linen Supply Co., 430 U.S. at 568; United States v. Wilson, 430 U.S. at 336; United States v. Sanges, 144 U.S. at 312, 318-23. Adoption of state law as the federal rule would not meet this requirement of statutory author-

ization, for such a federal rule would be a "common law" rule, even if based upon a state statute. See United States v. Crain, 589 F.2d at 998-1000; United States v. Best, 573 F.2d 1095, 1101 (9th Cir. 1978).

In conclusion, only Congress can authorize an appeal by a state in a § 1442 (a)(1) criminal prosecution. Thus far, Congress has not seen fit to do so. Therefore, we hold that we are without jurisdiction to entertain this appeal.

APPEAL DISMISSED.

FOOTNOTES

1. [reference on page 1]

28 U.S.C. § 1442(a)(1) provides

> A civil action or criminal prosecution commenced in a state court against any of the following persons may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending.
>
> (1) Any officer of the United States or any agency thereof, or any person acting under him, for any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of revenue.

2. [reference on page 2]

The court stated that its reason for ordering Manypenny's acquittal was that he was entitled to immunity under the principle announced In re Neagle, 135 U.S. 1 (1890). See Clifton v. Cox, 549 F.2d 722 (9th Cir. 1977). The immunity defense had not been raised at trial. However, the district court concluded that it had erred in failing to sua sponte instruct the jury on such a defense.

3. [reference on page 2]

In his dissent, Judge Kennedy suggests that tnis court may have jurisdiction over the State's appeal under 28 U.S.C. § 1291, the final judgement rule. We disagree.

The Supreme Court has twice held that general appeals provisions are not sufficiently explicit to overcome the common-law rule that the State may not appeal an adverse decision in a criminal case. United States v. Wilson, 420 U.S. 332, 336 (1975); United States v. Sanges, 144 U.S. 310, 318, 322-23 (1892). A statute expressly giving the State a right to appeal in a criminal case is required. Section 1291 is not such a statute. Neither does § 1291 allow us to refer to state law to determine whether or not the State has a right of appeal. See discussion of state law infra.

4. [reference on page 3]

Nowhere in the legislative history of the various criminal appeals acts does it appear that Congress addressed or even considered appeals by the State in state prosecutions before the federal courts under § 1442. See S. Rep. No. 1296, 91st Cong., 2d Sess. (1970) H.R. Rep. No. 1768, 91st Cong., 2d Sess. (1970) 41 Cong. Rec. 2190-97 (Feb. 4, 1907), 2744-63 (Feb. 12, 1907). The reports and debate on the issue of such acts indicate that Congress was concerned only with the right of the federal

Government to appeal in criminal cases. See S. Rep. No. 1296 at 2, 5, 9-11, 18 H.R. Rep. No. 1768 at 21 41 Cong. Rec. at 2190 (remarks of Sen. Hale) (remarks of Sen. Bacon) (concerned with lower court determinations that acts of Congress unconstitutional), 2760 (remarks of Sen. Spooner) (the United States should have the same right to appeal in federal criminal cases as many of the states do in their own courts).

Re: STATE OF ARIZONA v. WILLIAM DALE MANYPENNY, No. 77-3453

KENNEDY, Circuit Judge, dissenting:

I respectfully dissent from the majority's conclusion that we are without jurisdiction to entertain this appeal.

There are two possible sources of jurisdiction, 18 U.S.C. § 3731 and 28 U.S.C. § 1291. With respect to § 3731, the majority concludes that the section must be confined to the United States. This is a reasonable position and it certainly has textual validity. But while a court cannot ignore the language of the statute, the Supreme Court has warned against "the dangers of an approach to statutory construction which confines itself to the bare words of a statute . . . for 'literalness may be a strangle meaning.'"

Lynch v. Overholser, 369 U.S. 705, 710 (1962) (quoting Utah Junk Co. v. Porter, 328 U.S. 39, 44 (1946)). It is true that no court has ever interpreted section 3731 as providing for appeals by a state; on the other hand we find no holding to the contrary. This is apparently, a case of first impression. The legislative history reveals that Congress simply never considered the question before us. I conclude that Congress did not intend a state to be completely prohibited from appealing in a removed criminal prosecution. My concern with the majority's approach is that as well as producing an anomalous result, it creates serious and difficult problems of federalism. In effect the majority opinion holds that through removal, a state cannot only be deprived of jurisdiction to try a case in its own

courts, it can also be completely deprived of any right to appeal that would have existed under state law.

The original Criminal Appeals Act, 34 Stat. 1246, was the subject of extended congressional debate. See United States v. Sisson, 399 U.S. 267, 293-96 (1970). Upon its enactment, government appeals were limited to a narrow category of cases. The Act was amended in 1971 to permit all appeals that can be maintained consistently with the Constitution, and thus the amendment "remove[d] all statutory barriers to Government appeals." United States v. Wilson, 420 U.S. 332, 337 (1975). The new Act contains a provision that it shall be liberally construed. 18 U.S.C. § 3731. The statutory scheme is designed to prevent erroneous trial court rulings from thwarting lawful

prosecutions. That policy applies with equal force to appeals in those cases in which the state is the prosecuting entity under the removal statute. In view of the sensitive nature of state-federal relations in section 1442(a)(1) removal cases, I do not believe that Congress intended to deprive states of any right to appeal.

Even if one agrees with the majority's interpretation of section 3731, there remains another possible source of jurisdiction, that is, the general grant of appellate jurisdiction under 28 U.S.C. § 1291. In United States v. Sanges, 144 U.S. 310 (1892), the Supreme Court held that the United States cannot appeal in a criminal case without express congressional authorization. The Court surveyed both English and American state precedent

and concluded that the settled practice was that the state could not appeal criminal cases except in accordance with express statutes. The Court then concluded:

> "In none of the provisions of this act, defining the appellate jurisdiction, either of this court, or of the Circuit Court of Appeals, is there any indication of an intention to confer upon the United States the right to bring up a criminal case of any grade after judgment below in favor of the defendant. It is impossible to presume an intention on the part of Congress to make so serious and far-reaching an innovation in the criminal jurisprudence of the United States."

Id. at 323.

While Sanges is instructive, neither it nor any other case has held that there must be express congressional authorization in order for a state to appeal in federal court.

The rule in English and American law which requires statutory authorization

before the prosecution can appeal is rooted in the concern that a sovereign not be given the uncontrolled right to prolong criminal proceedings against those subject to its jurisdiction. See id. at 315-16. Except for this concern, there is nothing peculiar to a criminal judgment that prevents its being appealed under a general grant of appellate jurisdiction, and this is true regardless of the identity of the prevailing party at trial. By enactment of 18 U.S.C. § 3731 the Government of the United States has determined that its interests are well served by criminal appeals, and that the rights of its citizens are given adequate protection by the double jeopardy clause. Given the purposes of the rule requiring special authority for criminal appeals, it was neither appropriate nor necessary for Congress to speak to the

authority of prosecutors who represent a separate state as the sovereign initiating criminal charges. That question is solely the prerogative of the State of Arizona, and the State allows appeals in cases such as the one before us. The State's authorization should suffice to permit this appeal under the general appellate jurisdiction granted by 28 U.S.C. § 1291.

Construing section 1291 as giving us jurisdiction to hear an appeal by a state where such appeals are explicitly provided for by state law is not inconsistent with the purpose of allowing removal in cases where federal officers are involved. The federal policies at stake -- to provide a fair trial for government officers, free from local bias -- are not furthered by altering the

instances in which appellate review may be secured by the state. Further, following the state rule would violate no other federal policies. For example, the workload of the federal courts, the integrity of the federal forum, the difficulty of complying with state rules, are not involved here.

If one views the right to appeal as substantive, it is completely consistent with the general scheme in removal actions to look to state law.[1] As the Notes of the Advisory Committee state, in section 1441(a)(1) removal cases, "the Federal Courts apply the substantive law of the State, but follow Federal procedure." Notes of the Advisory Committee on Rules, Fed. R. Crim. P. 54(b)(1).

Having proposed two alternative bases of jurisdiction, I realize that

under some circumstances, specifically where the state has not provided for appeals by the state, it will make a difference which theory is relied on. In this case, however, I need not decide between the theories because I conclude that Arizona does provide for appeals by the state.

In State ex rel. Dawson v. Superior Court, 112 Ariz. 123, 538 P.2d 397 (1975), the Supreme Court of Arizona granted appellate review, by certiorari, see Ariz. Rev. Stat. § 12-2001, of a trial court order setting aside a jury verdict of guilty, followed by entry of a judgment of acquittal.[2] After once remanding to the trial court, the Arizona Court of Appeals reviewed the case on the merits and again confirmed the state's authority to seek review of a trial court's entry of judgment of acquittal. State v. Allen, 27 Ariz.App.

577, P.2d 176 (1976). I conclude, therefore, that even if state law were to be controlling, it would not bar Arizona's appeal in this case.[3]

Because the majority reaches a contrary conclusion on this first issue, it has not explored the other problem raised by this case. However, having examined the case, I conclude not only that there is jurisdiction, but that the judgment ought to be reversed.

I turn first to a consideration of whether an appellate ruling favorable to the state would put the defendant twice in jeopardy as a matter of federal law, thus barring the appeal.[4] I think the argument must be resolved against the defendant based on a previous decision of this court and more recent decisions of the Supreme Court of the United States.

The entry of a judgment of acquittal, after the jury has returned a verdict of guilty, may be set aside on review without offending the principle against placing a defendant twice in jeopardy because the jury verdict can be reinstated, obviating the need for a second trial. In this case there was also a motion for new trial that was not denied or otherwise ruled upon by the trial court. It should be deemed pending upon remand. If granted, there would be further proceedings, but only because the defendant has asked for them. This outcome similarly does not violate the double jeopardy clause. The reasons for these conclusions follow.

Our circuit has squarely held that where a jury has returned a verdict and the trial judge subsequently grants a motion for acquittal under rule 29(c),

the prosecution may appeal the judgment, and the jury verdict can be reinstated without violating the double jeopardy clause. United States v. Rojas, 554 F.2d 938 (9th Cir. 1977). The Rojas case was decided before a series of Supreme Court cases, United States v. Scott, 46 U.S.L.W. 4653 (June 14, 1978); Sanabria v. United States, 46 U.S.L.W. 4646 (June 14, 1978); Burks v. United States, 46 U.S.L.W. 4632 (June 14, 1978), and it must be decided, therefore, whether those cases overruled Rojas. I conclude they did not.

In United States v. Scott, the court addressed in footnote 7 the problem we face. Referring to its earlier decision in United States v. Jenkins, 420 U.S. 358 (1975), the Court stated:

> "In Jenkins we had assumed that a judgment of acquittal could be appealed where no retrial would be needed on remand:

> 'When this principle is applied to the situation where the jury returns a verdict of guilt but the trial court thereafter enters a judgment of acquittal an appeal is permitted. In that situation a conclusion by an appellate court that the judgment of acquittal was improper does not require a criminal defendant to submit to a second trial; the error can be corrected on remand by the entry of a judgment on the verdict.' 430 U.S. at 365. Despite the Court's heavy emphasis on the finality of an acquittal in Martin Linen and Sanabria v. United States, . . . neither decision explicitly repudiates this assumption."

46 U.S.L.W. at 4655, n.7 (citation omitted). This analysis is consistent with the result our court reached in Rojas.

The defendant focuses on language in Sanabria, emphasizing the differences between acquittals and dismissals of the indictment. The reference to acquittals in the Sanabria case, however, is directed to the instance in which a defendant necessarily must be tried again, by reason

of the errors assigned on the prosecution's appeal, because there is no verdict to reinstate. Those considerations are inapposite to the instant case, where there has been a jury verdict which can be reinstated if the prosecution's arguments are accepted. The footnote quoted above from Scott is controlling, as is our Rojas decision.

Our reversal of the trial court's judgment of acquittal would result in reinstatement of the guilty verdict, subject to the defendant's motion for new trial. The defendant originally moved in the alternative for an order arresting judgment for a new trial. Since the district court granted the motion to arrest judgment, the motion for a new trial became moot. If the trial court's judgment were reversed, that motion would no longer

be moot and should be passed on by the district court. Thus, a second trial might be appropriate in this case. If so, however, it would not be ordered as a result of the errors assigned by the prosecution's appeal or as a result of our reversing the judgment of acquittal. The only cause for new trial, if one were granted, would be the defendant's motion for new trial. Where the new trial is granted at the request of the defendant, and there has been no bad faith conduct by the judge or prosecutor, there is no double jeopardy bar. United States v. Dinitz, 424 U.S. 600, 611 (1976). Here the defendant might still pursue the motion for a new trial, based, apparently, on his desire to raise the Clifton defense. That might be a proper request, but since it would be at

his instance double jeopardy concerns are not implicated.

I turn now to the merits of the district court's ruling. As an initial matter, the State argues that the judge lacked jurisdiction to enter a judgment of acquittal because, contrary to the requirements of rule 29(c), the defendant failed to file a proper motion within seven days of the verdict. At least two circuits have held that unless a timely motion is filed, the judge lacks jurisdiction to enter a judgment of acquittal. United States v. Johnson, 487 F.2d 1318, 1321 (5th Cir.), cert. denied, 419 U.S. 825 (1974); Rowlette v. United States, 392 F.2d 437, 439 (10th Cir. 1968). See also United States v. Homer, 411 F. Supp. 972, 975 (W.D. Pas.), aff'd on other grounds, 545 F.2d 864 (3rd Cir. 1976), cert. denied,

431 U.S. 954 (1977). The defendant did file motions for arrest of judgment and for a new trial within the time limits prescribed by rules 29(c) and 34. The court having retained jurisdiction over the case, I think it had discretion to consider entry of a judgment of acquittal on its own motion, where it was convinced there had been a fundamental error in its instructions, Fed. R. Crim. P. 2.

I conclude further, however, that the trial court misused its discretion in granting judgment of acquittal. The court's ruling was based on the premise that the evidence was insufficient to overcome a defense of immunity under Clifton v. Cox, supra. The defense of immunity was not raised or argued at all at trial. The defendant had the burden of raising immunity as an affirmative defense but did not do

that. Given the confused state of the evidence, which we discuss further below, this may have been a deliberate trial strategy. In these circumstances the Government cannot be faulted for failing to prove that grounds for immunity were not present. It makes no sense to apply a test of insufficiency of the evidence to a defense not raised at trial and pertaining to a subject that the Government did not have the duty to open. At most, the defendant is entitled to a new trial so that he may have the advantage of the Clifton case in preparing his defense.

Moreover, I think the evidence introduced at the first trial may have permitted a reasonable inference that the defendant was not executing his duties in good faith, and therefore that the judgment of acquittal was improper. The defendant's

theory was that his gun twice went off by accident and coincidentally hit the victim at a distance of 120 feet. The victim was hit in the back by multiple pellets from at least two shells. Three twelve-gauge shotgun shells were found within eight inches of one another to the right of the trail. All three of them had the smell of fresh powder on them. The defendant had no explanation for the shells being so close together. He testified that the accidental shots were fired about fifteen feet apart. In addition, he originally denied that the victim had been shot. Later he told different versions of what happened, at one point stating that he meant to shoot in front of the victim, and other times stating that he shot the man intentionally because he was uncertain whether his partner was safe. Finally, the defendant

testified that when a suspected illegal alien runs back towards the border, as the victim was doing, it is normal procedure to let him go. He gave no explanation why that practice was not followed in this case.

On remand, the district court would have the defendant's motion for a new trial before it. I express no opinion on the propriety of granting this motion as it rests largely with the trial court's discretion. I do note that Clifton did not create a new defense. The immunity defense for federal officers has been in existence since In re Neagle, 135 U.S. 1 (1890); Clifton reaffirmed the existence of federal officer immunity.

I would hold that this court has jurisdiction and reverse and remand.

FOOTNOTES

1/ The analysis of whether the right to appeal is substantive or procedural is not governed, in a strict sense, by the principles of Erie Railroad v. Thompkins, 304 U.S. 64 (1938), and its progeny, see, e.g., Hanna v. Plumer, 380 U.S. 460 (1965), for this case is not in federal court because of diversity jurisdiction. The instant case concerns the actions of an officer in his federal capacity and by the removal statute, 28 U.S.C. § 1442(a)(1), Congress has made the implicit declaration that such suits are ones arising under the laws of the United States. Osborn v. United States, 22 U.S. (9 Wheat.) 738 (1824); Tennessee v. Davis, 100 U.S. 257 (1880). There is no Rules of Decision Act, 28 U.S.C. § 1652, or Rules Enabling Act, 28 U.S.C. § 2072, which governs the choice of law analysis in such actions. Cf. Notes of Advisory Committee on Rules, Fed. R. Crim. P. 54 (b)(1) (in section 1441(a)(1) removal cases, "the Federal Court applies the substantive law of the State, but follows Federal procedure"). The Erie line of cases, however, would be useful by analogy, for if we were to say the right in question is a substantive one and conclude further that Congress has by statute prescribed a federal standard which overrides the state rule on a point which has no bearing upon federal interests in the case, (interests such as the defense of immunity and providing a neutral forum for the trial of federal officers), then we would be exercising federal jurisdiction in a sensitive, perhaps new, dimension. Accordingly, I think the

Erie line of cases, adopting a general distinction between substantive and procedural rights, would help resolve a choice of law question as to the right of appeal in this case.

The Government's right to appeal in a criminal case could be characterized as substantive, since a particular jurisdiction may afford to the defendant greater protection against multiple trials than is required by the minimum dictates of the fifth amendment double jeopardy clause. See the debates on the first Criminal Appeals Act, discussed in United States v. Sisson, 339 U.S. 267, 293-96 (1970). On the other hand, it cannot be doubted that Congress has an interest in assigning the responsibility for ruling on questions of law between federal trial and appellate courts, courts which operate under different constraints than do those of a state, and such concerns seem to be procedural in nature. In making the substantive-procedural determination, we would think that balancing the importance of the state and federal policies implicated would be a significant factor in the inquiry. Cf. Ely, The Irrepressible Myth of Erie, 87 Harv. L. Rev. 693, 717 n.130 (1974); Redish and Phillips, Erie and the Rules of Decision Act: In Search of the Appropriate Dilemma, 91 Harv. L. Rev. 356 (1977) (disagreeing on whether balancing the importance of state and federal policies is appropriate in deciding whether state or federal law should be followed in diversity cases).

What are the state policies supporting its determination of when the

state may appeal? Finality and repose are the principal purposes as well, I suppose, as a desire to correct the more serious errors in the lower court proceedings. These considerations also support state decisions regarding statute of limitations and res judicata questions. Both of these issues, in the Erie context, have been held matters of state law.

Moreover, Arizona and New Mexico cases have held the right to appeal to be a substantive question. State v. Birmingham, 96 Ariz. 109, 392 P.2d 774, 776 (1964); In re Maricopa County, Juvenile Action No. JS-834, 26 Ariz.App. 485, 549 P.2d 580, 583-84 (1976). See Durand v. New Mexico Comm'n on Alcoholism, 89 N.M. 434, 553 P.2d 715, 715 (Ct.App. 1976).

Of course, some parts of state appeals statutes might be framed so that compliance by the federal court with all their provisions would be impossible (e.g., specifying which district or which intermediate court of appeals is the proper forum for hearing the appeal). For these questions, federal law and procedure would control. But as to the basic question whether the state can secure appellate review, state law can be accomodated by the federal system.

2/ It is quite possible that Arizona courts would permit the state to appeal in this case under Ariz. Rev. Stat. § 13-4032 (5), which permits the state to appeal from "[a]n order made after the judgment affecting the substantial rights of the state." See Ariz. R. Crim. P. 24.2; Rules of the

Supreme Court of Ariz. 22(c)(3); State v. Birmingham, 96 Ariz. 109, 392 P.2d 775 (1964) ("order" and "judgment" are synonymous as used in the civil appeals statute, Ariz. Rev. Stat. § 12-2101); State v. Allen, 557 P.2d at 182-83. Even if no right of appeal existed under § 13-4032, however, appellate review is appropriate under the certiorari statute.

3/ Arizona courts have held that although the certiorari statute speaks of review to determine whether the lower court lacked jurisdiction, the statute also permits review to determine whether a lower court abused its discretion. See, e.g., State ex rel. Dawson v. Superior Court, 112 Ariz. 123, 538 P.2d 397, (1975); State ex rel. Ronan v. Superior Court, 95 Ariz. 319, 390 P.2d 109 (1964) ("A writ of certiorari may be used to review abuse of discretion."); Jones v. Lopez Plascencia, 10 Ariz.App. 253, 458 P.2d 120 (Ct. App. 1969).

4/ If this appeal is viewed as falling under § 3731 then the question of double jeopardy is jurisdictional because that section provides that "no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution." If jurisdiction is found by virtue of § 1291 then the double jeopardy issue still must be reached, though technically the presence of double jeopardy is a constitutional bar to a second trial, not a jurisdictional defect in this appeal.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

STATE OF ARIZONA,	)	
	)	
Plaintiff-Appellant,	)	No. 77-3453
	)	
vs.	)	OPINION
	)	
WILLIAM DALE MANYPENNY,	)	
	)	
Defendant-Appellee.	)	
	)	
	)	

Appeal from the United States District Court for the District of Arizona

Filed: July 31, 1978, Emil E. Melfi, Jr. Clerk, U.S. Court of Appeals

Before: CHOY and KENNEDY, Circuit Judges, and HALL,* District Judge.

PER CURIAM:

We assume arguendo that the State of Arizona, in its criminal prosecution which was removed to the federal court,

*The Honorable Peirson M. Hall, Senior United States District Judge for the Central District of California, sitting by designation.

has the same right of appeal under 18 U.S.C. § 3731 as is conferred on the United States in a federal prosecution. On the facts of this case, however, a judgment of acquittal was entered, and that judgment is final and unreviewable. Sanabria v. United States, ____ U.S. ____, 46 U.S.L.W. 4646 (June 14, 1978). Accordingly, the appeal is dismissed.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

THE STATE OF ARIZONA,	)	
	)	
Plaintiff,	)	No. CR-76-377-TUC-WCF
	)	
vs.	)	
	)	
WILLIAM DALE MANYPENNY,	)	ORDER
	)	
Defendant.	)	
	)	
	)	

Filed: September 28, 1977, 2:02 P.M., W. J. Furstenau, Clerk, U.S. District Court for the District of Arizona

While acting as a Border Patrol Officer the defendant, William Dale Manypenny, shot and injured a fleeing alien. The event occurred on the Organ Pipe National Monument in Pima County, Arizona, not far from the Mexican border, or perhaps on the Papago Indian Reservation which is also in Pima County. Manypenny was indicted

in the Pima County Superior Court for assault with a deadly weapon or instrument, a violation of A.R.S. Section 13-249A and B. The case was removed to this Court pursuant to Title 28, United States Code, Section 1442(a)(1). The defendant was tried and the jury returned a verdict of guilty. When defendant moved for new trial and for arrest of judgment, the Pima County Attorney failed to respond and the motion to arrest judgment was granted. The County Attorney immediately moved for reconsideration and this Court granted the motion.

The motion for arrest of judgment contended that the State of Arizona, and therefore this Court on removal, had no criminal jurisdiction over the land within either the Organ Pipe National Monument

or the Pagago Indian Reservation. Defendant also contended that the area of immigration is preempted by the United States and that his prosecution is an attempt at regulation of immigration, and, therefore, void. He argued further that the federal criminal laws must be applied to his acts instead of Arizona laws, Title 18, United States Code, Section 13 and that his acts as a federal officer are not within the jurisdiction of the State.

The Court finds on reconsideration that Arizona has criminal jurisdiction over both the Organ Pipe National Monument and the Papago Indian Reservation, that the Arizona statute is not void as applied to the area of immigration and that the Arizona criminal statute can be used as to events occurring on said lands. However,

the Court also finds that officers acting under color of federal law have a perfect defense to state criminal prosecutions when their actions are honestly and reasonably believed to be necessary and proper in carrying out their federal duties and that such defense is here established.

Jurisdiction over the place of occurrence will be discussed first. The general rule is that a state has complete jurisdiction over the land within its exterior boundaries. United States v. McBratney, 104 U.S. 621 (1881); People v. Martin, 326 U.S. 496, 66 S.Ct. 307 (1946). There are three exceptions. The first is provided by Article I, Section 8, Clause 17 of the Constitution of the United States. The United States has exclusive jurisdiction

over land "purchased" by the United States "by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, Dock-Yards, and other needful Buildings". Since the land here in question was not "purchased" and is not for one of the specified purposes, the first exception is admitted by defendant not to apply. Fort Leavenworth R. Co. V. Lowe, 114 U.S. 525, 5 S.Ct. 995 (1885). Some examples of such land in Arizona are provided by A.R.S. Sections 26-251 through 253 (land for military purposes) and Sections 37-611 through 613 (land for penal purposes).

A second exception is recognized when a state affirms the United States' retention of exclusive jurisdiction at the time it is admitted into the Union. Defendant strongly urges the argument that Arizona

has so affirmed in Section 20 of its Enabling Act, 36 Stat. 557, 1 A.R.S., p. 81 and Article XX, Paragraph Fourth of Arizona's Constitution, 1 A.R.S. P. 181:

> "Fourth. The people inhabiting this State do agree and declare that they forever disclaim all right and title to the unappropriated and ungranted public lands lying within the boundaries thereof and to all lands lying within said boundaries owned or held by any Indian or Indian tribes, the right or title to which shall have been acquired through or from the United States or any prior sovereignty, and that, until the title of such Indian or Indian tribes shall have been extinguished, the same shall be, and remain, subject to the disposition and under the absolute jurisdiction and control of the Congress of the United States."

Draper v. United States, 164 U.S. 240, 17 S.Ct. 107 (1896), interpreted a clause from the Enabling Act of Montana which is very similar to Arizona's Enabling Act and which appears indistinguishable

for the purposes of this case. The holding of the case was that the United States had no jurisdiction over a non-Indian who murdered a non-Indian on an Indian reservation and that Montana did have jurisdiction. The reasoning of the case was that the "absolute jurisdiction" language of the Act was intended only to preserve the complete control of the United States over the title to Indian lands owned by Indians outside of reservations. The United States had an interest in preventing the State of Montana from frustrating federal limitations on the alienability of Indian lands.

Organized Village of Kake v. Egan, 369 U.S. 60, 82 S.Ct. 562 held that the disclaimer of "right and title" in a similar clause by Alaska was a disclaimer of propriety rather than governmental interest.

It held further that "absolute" means undiminished, not exclusive.

These cases show that Arizona did not disclaim governmental interests over any land within its external boundaries by this clause in its Constitution. Even a military reservation comes under the jurisdiction of the state on statehood when there is no express savings clause to prevent it. Fort Leavenworth R. Co. v. Lowe, supra. For an example of such an express savings clause, see, the Act admitting the State of Wyoming into the Union, 26 Stat. 222 and Title 16, United States Code, Section 24 (Yellowstone National Park).

The third exception is the cession of jurisdiction to the United States by an individual state after statehood. Collins v. Yosemite Park and Curry Co., 304 U.S.

518, 58 S.Ct. 1009 (1938). Yosemite National Park came under the qualified jurisdiction of the United States by this means in 1919. Many National Parks and National Monuments are now under the "sole and exclusive" jurisdiction of the United States. Eg., Title 16, United States Code, Sections 95, 117, 124, 157 and many others. No such cession of jurisdiction was ever made by Arizona until 1976 after the events in this case. See 1964 U.S. Code Cong. & Ad. News 3923 recognizing the facts as they then stood; and A.R.S. Section 37-620, Laws 1976, Ch. 54, Section 1 which cedes concurrent rather than exclusive jurisdiction to the United States over the Organ Pipe Cactus National Monument and other parks, monuments, forest and dams.

Since Arizona does have jurisdiction over the land in question, its power

to prosecute an Immigration Officer acting under color of his federal duty must be examined. Further, since the Arizona criminal law concerning assault with a deadly weapon is not a direct attempt to regulate immigration and since it expresses legitimate State concerns, the preemption doctrine does not prevent the applicability of this law unless it is an unreasonable burden on the implementation of federal immigration policy. Cf., Southern Pac. Co. v. State of Arizona, 325 U.S. 761, 65 S.Ct. 1515 (1945). This is apparently the exact intent of Congress. Title 8, United States Code, Section 1358 provides for local jurisdiction within immigration stations to enforce state criminal laws. The reasonableness of the burden in this situation appears to this Court to involve many of the same consider-

ations as the official duty doctrine protecting federal officers as set out In re Neagle, 135 U.S. 1, 10 S.Ct. 658 (1890); and Clifton v. Cox, 549 F.2d 722 (9th Cir. 1977). Therefore, these two matters will be discussed together later herein.

People v. Martin, supra, sufficiently answers defendant's contention that only the federal criminal statutes can be applied to him even by the State. When there is concurrent jurisdiction, the State may use its own criminal statutes to prosecute.

Clifton v. Cox, supra, thoroughly reviews the history and the present status of the doctrine set out in the landmark case of In re Neagle, supra. It is not necessary for this Court to repeat the reasoning from Clifton; it is sufficient

to summarize the holding:

If a person is authorized to do an act by the law of the United States and if he does no more than what is necessary and proper for him to do, he is innocent of any crime against the laws of any state. This is true if the acts are within the outer perimeter of his line of duty, taking into account that the concept of duty encompasses the sound exercise of discretionary authority. Further, even when an act is not actually authorized, errors of judgment in what one conceives to be his legal duty will not, alone, serve to create criminal responsibility of a federal officer. An officer's acts are <u>not</u> necessary and proper only if the official employs means which he cannot honestly consider reasonable in discharging his duties or otherwise acts out of malice or with some criminal intent. The finder

of fact may find that the actions were not reasonable under all of the circumstances; however, when the evidence shows that the officer honestly believed them to be reasonable, he must be found innocent.

As limited by this doctrine, Arizona's criminal law against assault with a deadly weapon cannot be said to be an unreasonable burden on the implementation of federal immigration policies. Congress has provided two procedural devices in addition to this judge-shaped doctrine which protect federal officers and federal policies. They are the habeas corpus provision, Title 28, United States Code, Section 2241(c)(2), used in Clifton, and the removal statute, Title 28, United States Code, Section 1442(a)(1), used in the present case. These three limitations are all the protection that the federal

immigration policy requires. State criminal law may constitutionally be applied in this case; thus, this Court has jurisdiction.

Prodecurally, it is unclear if the determination as to whether defendant Manypenny was carrying out federal duties in performing the act should be decided as a question of law by the Court or should be decided by a jury as a question of fact. United States ex rel. Drury v. Lewis, 200 U.S. 1, 26 S.Ct. 229 (1906), seems to hold that it is a question of fact for the jury, but Clifton says:

> "The issue of petitioner's scope of authority presents a question of law which we find was properly resolved by the district court." Id., 547 F.2d at 726.

In either event, this Court committed fundamental error; the issue was not

properly resolved by the Court at the time of trial. The Court should have considered this principle of law and thus granted defendant's motion for verdict of acquittal or failing that should have submitted the matter to the jury on altogether different instructions which embodied this federal law on the matter of the officer's reasonable belief.

Again, in either event, it now appears that the procedurally correct method of rectifying the error after trial was not to arrest judgment pursuant to Title 28, United States Code, Federal Rules of Criminal Procedure, Rule 34, but to grant a judgment of acquittal pursuant to Rule 29(c) or a new trial pursuant to Rule 33. On reconsideration, the Court must reverse its arrest of judgment and proceed with matters as they now stand.

In order to secure simplicity in procedure, fairness in administration and the just determination of this proceeding, this Court will consider the motion for arrest of judgment as a motion under Rule 29(c) for judgment of acquittal. Federal Rules of Criminal Procedure, Rule 2; cf., United States v. Baker, 432 F.2d 994 (10th Cir. 1970).

The test for such a motion is whether, viewing the evidence in light favorable to the government, there is relevant evidence from which the jury could reasonably find that the defendant was guilty beyond a reasonable doubt. United States v. Rojas, 554 F.2d 938 (9th Cir. 1977), Applying the standards set out in Clifton v. Cox, supra, and considering further the standard in Rojas, the Court

finds that a reasonable jury could not conclude defendant's guilt beyond a reasonable doubt. The motion for judgment of acquittal shall be granted.

IT IS ORDERED that the Order of this Court entered November 30, 1976, is vacated, the motion for arrest of judgment heretofore granted is reconsidered and denied.

IT IS FURTHER ORDERED that considering the motion for arrest of judgment as a motion for judgment of acquittal, the motion is granted, the verdict rendered herein is set aside; defendant William Dale Manypenny, is ADJUDGED not guilty.

IT IS FURTHER ORDERED that the Clerk of this Court forthwith mail a copy of this Order to all counsel of record herein.

DATED this 27th day of September, 1977.

APPENDIX D

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

STATE OF ARIZONA,	)	
	)	
Plaintiff-Appellant,	)	No. 77-3453
	)	
vs.	)	ORDER
	)	
WILLIAM DALE MANYPENNY,	)	
	)	
Defendant-Appellee.	)	
	)	
	)	

Filed: August 13, 1979, Emil E. Melfi, Jr. Clerk, U.S. Court of Appeals

Before: CHOY and KENNEDY, Circuit Judges, and HALL,* District Judge.

The dissenting opinion is amended as follows:

(1) At page 9, line 6 delete "at least once."

(2) At page 9, lines 7-8 after the words, "The victim was hit," delete

*The Honorable Peirson M. Hall, Senior United States District Judge for the Central District of California, sitting by designation.

"by not less than two pellets" and insert "in the back by multiple pellets from at least two shells."

APPENDIX E

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

STATE OF ARIZONA,	)	
	)	
Plaintiff-Appellant,	)	No. 77-3453
	)	
vs.	)	ORDER
	)	
WILLIAM DALE MANYPENNY,	)	
	)	
Defendant-Appellee.	)	
	)	
	)	

Filed: September 10, 1979, Emil E. Melfi, Jr., Clerk, U.S. Court of Appeals

Before: CHOY and KENNEDY, Circuit Judges, and HALL,* District Judge.

The panel as constituted in the above case has voted to deny the second petition for rehearing and to reject the suggestion for rehearing en banc. The full court has been advised of the suggestion for rehearing en banc and no judge of the

*The Honorable Peirson M. Hall, Senior United States District Judge for the Central District of California, sitting by designation.

court has voted to grant rehearing en banc. F.R.App.P. 35(b). The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

Appellant's Second Petition for Rehearing and Suggestion for Rehearing En Banc is ordered filed.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-621

STATE OF ARIZONA, PETITIONER

v.

WILLIAM DALE MANYPENNY, RESPONDENT

SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-621

STATE OF ARIZONA, PETITIONER

v.

WILLIAM DALE MANYPENNY, RESPONDENT

SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Respondent MANYPENNY asserts on pages 12 through 18 of his response that Arizona law would not allow the State of Arizona to seek appellate review from the trial court's sua sponte entry of a judgment of acquittal eleven months after the jury has returned a

guilty verdict. The issue of whether Arizona law allows appellate review in this situation is also discussed in the dissenting opinion of Judge Kennedy in the instant case. (Reported at 608 F.2d 1197; footnotes 2 and 3 found at 608 F.2d at 1203) A recent unanimous opinion issued by the Arizona Supreme Court demolishes this contention of the Respondent. State ex rel. Hyder v. Superior Court, ____ Ariz. ____, ____ P.2d ____ (Arizona Supreme Court No. 14579, opinion issued January 16, 1980) (reproduced at pages 4 through 8 infra) is directly on point. In that case, the trial court entered a judgment of acquittal as to first degree murder on its own motion eighty days after the jury returned a guilty verdict. The Arizona Supreme Court ruled the trial court had no power to do this and vacated the entry of the judgment of acquittal. This opinion was rendered after

the Ninth Circuit issued its opinion in the instant case and after the State's Petition For Writ Of Certiorari was filed on October 11, 1979.

Respectfully submitted this 3rd day of March, 1980.

STEPHEN D. NEELY
PIMA COUNTY ATTORNEY

Daniel Jesse Smith
Deputy County Attorney
Attorneys for Petitioner

IN THE SUPREME COURT OF THE STATE OF ARIZONA
En Banc

STATE OF ARIZONA ex rel. CHARLES F. HYDER, MARICOPA COUNTY ATTORNEY, Petitioner, v. SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the County of Maricopa, THE HONORABLE WARREN L. McCARTHY, JUDGE, Respondents, and JOHN CALLES MOYA, JR., Real Party in Interest.	)	Filed: Jan. 16, 1980 No. 14579

SPECIAL ACTION

Prayer for Relief Granted

Charles F. Hyder
Maricopa County Attorney
By Mark Deutsch
Deputy County Attorney — Phoenix
Attorneys for Petitioner

Ross P. Lee
Maricopa County Public Defender
By Anne Kappes
Deputy Public Defender — Phoenix
Attorneys for Real Party in Interest

HAYS, Justice

John Calles Moya, real party in interest, was convicted by a jury of first-degree murder. Eighty days after the jury verdict, the trial court, assuming inherent power to modify the verdict, entered a judgment of acquittal on the charge of first-degree murder, and a judgment of guilty of second-degree murder.

Petitioner, State of Arizona, brought this special action, urging that respondent exceeded his authority. We accepted jurisdiction under Rule 4, Rules of Procedure for Special Actions.

We have a single issue to resolve: May the court, on its own motion, enter a judgment of acquittal after the verdict?

On three occasions--at the close of the state's evidence, at the close of all the evidence, and immediately after the verdict--real party in interest moved for a judgment

of acquittal. The court denied all three motions.

One week after the verdict, counsel for Moya moved for a new trial under Rule 24, Rules of Criminal Procedure. The court twice heard arguments on this motion, took it under advisement, and ultimately denied it.

Rule 20, Rules of Criminal Procedure, governs disposition of motions for acquittal. The pertinent portions of the rule follow:

> a. Before Verdict. On motion of a defendant or on its own motion, the court shall enter a judgment of acquittal . . . after the evidence on either side is closed, if there is no substantial evidence to warrant a conviction.
>
> b. After Verdict. A motion for judgment of acquittal made before verdict may be renewed by a defendant within 10 days after the verdict was returned.

Careful reading of this rule makes it plain that the court may render a judgment of

acuittal, sua sponte, only before the case is submitted to the jury. Section B allows the defendant to renew a previously made motion after the verdict if the renewal is timely.

There is no authority for the court, on its own motion, to enter a judgment of acquittal after a jury verdict. As we most recently pointed out in State of Arizona v. Superior Court, County of Pima (No. 14526-PR, filed November 28, 1979), the court's authority in post-verdict proceedings is strictly limited by the Rules of Criminal Procedure.

The judgments of September 24, 1979, are hereby vacated and this case is remanded for proceedings consistent with this opinion.

JACK D. H. HAYS
Justice

CONCURRING:

FRED C. STRUCKMEYER, JR.
Chief Justice

WILLIAM A. HOLOHAN
Vice Chief Justice

JAMES DUKE CAMERON
Justice

FRANK X. GORDON, JR.
Justice

MAY 28 1980
MICHAEL RODAK, JR., CLERK

APPENDIX

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-621

THE STATE OF ARIZONA,

Petitioner

vs.

WILLIAM DALE MANYPENNY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 13, 1979
CERTIORARI GRANTED APRIL 14, 1980

APPENDIX

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-621

THE STATE OF ARIZONA,

Petitioner

vs.

WILLIAM DALE MANYPENNY

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 13, 1979
CERTIORARI GRANTED APRIL 14, 1980

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-621

THE STATE OF ARIZONA,

Petitioner

v.

WILLIAM DALE MANYPENNY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

INDEX

	Page
Relevant Docket Entries	1
Respondent's Motion For Arrest Of Judgment, November 15, 1976	5
Respondent's Motion For New Trial, November 15, 1976	15
Petitioner's Motion For Rehearing On Arrest of Judgment, December 3, 1976	17

INDEX

	Page
Petitioner's Response to Motion For Arrest of Judgment, December 3, 1976	19
District Court Order Granting Petitioner's Motion For Reconsideration, December 6, 1976	36
Respondent's Motion For Status Hearing, September 9, 1977	39
Decision of District Court, September 28, 1977, reported at 445 F.Supp. 1123. This is reproduced in the Petitioner For Certiorari at pages 41a through 57a.	
Original Per Curiam opinion of the Ninth Circuit, filed July 31, 1978, reproduced in Petition For Certiorari at 39a through 40a.	
Majority and dissenting opinions of the Ninth Circuit filed July 31, 1979 reported at 608 F.2d 1197. Reproduced in Petition For Certiorari at 1a through 38a.	
Order of the Ninth Circuit amending dissenting opinion, issued August 13, 1979. Reproduced in Petition For Certiorari at pages 58a through 59a.	

INDEX

Order of the Ninth Circuit denying Petition for Rehearing and suggestion for rehearing En Banc issued September 10, 1979. Reproduced in Petition For Certiorari at 60a through 61a.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

CR-76-377-Tucson

THE STATE OF ARIZONA

vs.

WILLIAM DALE MANYPENNY

DOCKET ENTRIES*

DATE	PROCEEDINGS
1976	
July 20	Petition for Removal from State court, Case No. A-29887, and copy of indictment
July 22	Record of Proceedings from the Superior Court of Arizona in Case No. A-29887
July 22	Defendant MANYPENNY'S Motion for Order Directing Attorney for the Government to Enter an Appearance
Nov. 1	Defendant MANYPENNY'S Motion for Dismissal

*Irrelevant docket entries have been omitted

DATE	PROCEEDINGS
Nov. 2	Defendant MANYPENNY'S Supplemental Memorandum in Support of Motion to Dismiss
Nov. 3	Minute Entry, RE Hearing on Defendant MANYPENNY'S Motion to Dismiss
Nov. 3	Defendant MANYPENNY'S Requested Voir Dire
Nov. 3	State of Arizona's Requested Jury Instructions
Nov. 3	Defendant MANYPENNY'S Requested Jury Instructions
Nov. 3	State of Arizona's Requested Voir Dire Questions
Nov. 4	Minute Entry, RE Jury Trial Proceedings
Nov. 5	Minute Entry, RE Jury Trial Proceedings
Nov. 6	Jury Verdict of Guilty as to Defendant MANYPENNY
Nov. 15	Defendant MANYPENNY'S Motion For Arrest of Judgment
Nov. 15	Defendant MANYPENNY'S Motion For New Trial

DATE	PROCEEDINGS
Nov. 15	Defendant MANYPENNY'S Notice of Hearing on Motion for Arrest of Judgment and Motion for New Trial
Nov. 30	Minute Entry, RE Hearing on Defendant MANYPENNY'S Motion for Arrest of Judgment and Motion for New Trial
Dec. 3	State of Arizona's Response to Motion For Arrest of Judgment
Dec. 3	State of Arizona's Motion for Rehearing on Arrest of Judgment
Dec. 6	Order Denying State of Arizona's Motion for Hearing or Oral Argument and Granting Motion for Reconsideration
Dec. 13	Defendant MANYPENNY'S Additional Authorities
1977	
Sept. 9	Defendant MANYPENNY'S Motion for Status Hearing
Sept. 26	Minute Entry RE Hearing on Defendant MANYPENNY'S Motion for Status Hearing

DATE	PROCEEDINGS
Sept. 28	Order Vacating Order entered 11/30/76, Denying Motion for Arrest of Judgment heretofore Granted, Motion for Arrest of Judgment treated as Motion for Judgment of Acquittal is Granted, verdict rendered herein is set aside; Defendant MANYPENNY is Adjudged Not Guilty
Oct. 17	State of Arizona's Notice of Appeal
Oct. 25	Designation for Record on Appeal

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Attorney for Defendant

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

Case No. CR 76-377 TUC WCF
(Filed November 15, 1976)

State Of Arizona, Plaintiff

v.

William Dale Manypenny, Defendant

MOTION FOR ARREST OF JUDGMENT (Rule 34)

Defendant respectfully moves the Court for an order arresting the judgment under the provisions of Rule 34, Rules of Criminal Procedure on the basis that the Court had no jurisdiction to try the offense charged in the indictment.

The indictment in the above case was rendered by a state grand jury for commission of a violation of the laws of the State of Arizona and was tried to this Court

under the Removal Statutes contained in 28 U.S.C. 1441 et. seq.

The effect of the removal to federal court does not invest the state prosecution with jurisdiction or power to try the case; rather, any defects in state jurisdiction, necessarily, if dealing with subject matter deprive the federal court of jurisdiction:

> "If the state court is without jurisdiction in the first instance, a federal court will have no removal jurisdiction based thereon even if the federal court would have had original jurisdiction had the action originally been brought there. Otherwise stated, federal removal jurisdiction is purely derivative, and if the state court had no jurisdiction, the federal court acquires none and gains none by removal, but must dismiss for want of jurisdiction. Wright, p. 132 (Referring to Wright, Law of Federal Courts [(1970 ed.], ch. 5.) Adams v. State Farm Mutual Automobile Insurance Co., 313 F.Supp. 1349 Miss., (1970). See also, A.J. Curtis & Co. v. D. W. Wills, Inc., 305 F.2nd 811, (CA2-1962). Emphasis added."

This motion, as supported by the Memorandum of Points and Authorities, will proceed on the supposition that lack of jurisdiction of the subject matter, i.e., special jurisdiction of the United States over certain crimes including assault, and other crimes involving unique federal concerns could not be remedied by the removal.

Dated this 15th day of November, 1976.

James D. Whitney
Attorney for Defendant

MEMORANDUM OF POINTS AND AUTHORITIES

On November 6th, 1976, the Defendant was convicted of the crime of assault with a deadly weapon, carrying with it the penalty of not less than five years to life. A.R.S. § 13-249, A & B.

Prior to trial, a motion was made by the Defendant to dismiss the indictment since the state action lacked jurisdiction because it represents a state inference with the conduct of federal law enforcement, and, also, since federal statutes had provided for the punishment of assault within territories under the exclusive or concurrent control of the federal government, the federal law was supreme and the state statutes governing assault could in no way be applied to the territories under the jurisdiction of the United States.

The United States Constitution is the supreme law of the land and any laws enacted by reason of this constituted authority are also the supreme law of the land, including the control and policing of federal lands.

Article VI, clause 2, of the Constitution provides "This Constitution, and the Laws of the United States which shall be made in Purance thereof; shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the contrary notwithstanding."

The Constitution has further made provision for the control and supervision of the public lands in addition to the general provision that the Congress shall make all laws necessary to carrying on the activities by the executive branch being quoted respectfully as:

> to ***make all needful Rules and Regulations inspecting the Territory or other Property belonging to the United States; ***, Art. IV, sec. 3, cl. 2.

and

> The Congress shall have the power ***To make all Laws which shall

> be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department of Officer thereof. Art. I, sec. 8, cl. 18.

Pursuant to this authority, the Congress enacted crimes specifically dealing with federal reservation, exclusive or concurrent, the rationale of which was to maintain order over federal lands, 18 U.S.C. Section 7, Williams v. United States, 327 U.S. 711 (1946) recites the fascination history of the circumstances and enactments culmination in the present law. It is evident that the intent of the legislature was to provide initial protection against the most serious of crimes and to then legislate as to the acts not covered by 18 U.S.C. Section 7 by the provisions of the Assimmulated Crimes act. Ibid. 712-713. See 18 U.S.C. Section 13.

The Arizona statutes in recognizing that areas of peculiar or unique federal interest existed, provided:

> A. A person is liable to punishment by the laws of this state for a crime or public offense committed by him therein, except as where it is by law cognizable exclusively in the courts of the United States. A.R.S. Section 13-150.

The enabling Act creating the state of Arizona specifically provided that the inhabitants of the ungranted lands and unappropriated lands forever disclaimed any interest. Section 20.

Granted under constitutional authority the United States has authority to control certain activities on the public reservations, the question becomes what type of activity should be controlled by the federal government exclusively through the federal courts:

> But the authority of the state laws or their administration may not interfere with carrying out of a national purpose. Where enforcement of the state law would handicap efforts to carry out the plans of the United States, the state enactment must give way. Stewart v. Sadrakula, 309 U.S. 94, (1940).

In the present case, there was never any question that the Defendant was enforcing federal statutes on immigration, on federal land, as federal officer. Brown v. Cain, 56 F.Supp. 56, (Pa. -1944). The law is clear that in all matters controlling the entrance of aliens, the United States law is supreme and that on that basis, the authority of the state to interfere with the activities of the aliens, federal agents should give way to supreme interests of the control over the admission of aliens into the United States***Ilines v. Davidowitz, 312 U.S. 52, 76 (1941).

The Defendant was performing his duty as provided by statute (8 U.S.C. Sec. 1347) and was attempting to apprehend someone in validation of federal law (8 U.S.C. Sec. 1325). The United States under its special jurisdiction of 18 U.S.C. Sec. 7 should be the only person to take cognizance of this act.

If the Defendant acted in excess of his jurisdiction, he should be tried under federal statutes applying to such matters, such as the federal and civil rights. 18 U.S.C. Sec. 242.

It should also be noted that the imposition of a state sentence upon a federal officer outlined above creates a disparaty of sentence far beyond the provision of 18 U.S.C. Section 113, creating a situation where the federal officer acting in the territorial jurisdiction of the United

States is punished far beyond the provisions intended by federal law for its special jurisdiction. Hockenberry v. United States, 422 F.2nd 171, (1970).

In regard to the status of the Organ Pipe National Monument where the offense, by all testimony takes place, is under the control of the Director of the National Park Service, see documents to original motion to dismiss, and the lands so reserved and used should be considered under the preview of Sections 7 and 113 of Title 13.

By this reference, Defendant attaches all documents in Motion to Dismiss.

Dated this 15th day of November, 1976.

James D. Whitney
Attorney for Defendant

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Telephone: 884-9122
Attorney for Defendant

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

Case No. CR 76-377 TUC WCF
(Filed November 15, 1976)

State of Arizona, Plaintiff

v.

William Dale Manypenny, Defendant

MOTION FOR NEW TRIAL (Rule 33)

Defendant moves the Court for a New Trial under the provisions of Rule 33, Rules of Criminal Procedure in the interests of justice in the following respects:

(1) the Prosecution used as statement not disclosed to the Defendant or alluded to in any of the discovery materials; further no transcript of said proceedings were furnished;

(2) the Court permitted an instruction to the jury that "You are instructed that a loaded gun is a deadly weapon as a matter of law;" and

(3) a statement was not provided to the Defendant as required by Local Rule 86, Criminal Rules of Procedure.

The above actions and rulings of the Court were in contradiction and violation of the laws of the State of Arizona where applicable and the Court should order a new trial.

Dated this 15th day of November, 1976.

James D. Whitney
Attorney for Defendant

cc: mailed this 15th day of November, 1976 to Larry Lingeman, County Attorney's Office, 9th Floor, Courts Building, Tucson, Arizona, 85701

(attached Memorandum of Points and Authorities omitted)

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UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

Case No. CR 76-377 TUC WCF
(Filed December 3, 1976)

The State Of Arizona, Plaintiff

v.

William Dale Manypenny, Defendant

MOTION FOR REHEARING ON ARREST OF JUDGMENT

COMES NOW the State of Arizona, by and through the Pima County Attorney, STEPHEN D. NEELY, and his deputy, LARRY J. LINGEMAN, and requests this Honorable Court for a rehearing of Defense counsel's Motion for Arrest of Judgment and this Court's subsequent dismissal for the reason that the State has filed a response to said motion, none having been filed on the date of the hearing because the State was not aware of the pending motion.

Respectfully submitted this 3rd day December, 1976.

STEPHEN D. NEELY
PIMA COUNTY ATTORNEY

_____
Larry J. Lingeman
Deputy County Attorney

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UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

Case No. CR 76-377 TUC WCF
(Filed December 3, 1976)

The State Of Arizona, Plaintiff

vs.

William Dale Manypenny, Defendant

RESPONSE TO MOTION FOR ARREST OF JUDGMENT

COMES NOW the State of Arizona, by and through the Pima County Attorney, STEPHEN D. NEELY and his deputy, LARRY J. LINGEMAN, pursuant to leave of Court to file a late response by the Honorable William C. Frey, opposes the motion for arrest of judgment on the grounds that these issues have already been raised and fully argued and for reasons set forth in the accompanying Memorandum.

Respectfully submitted this 3rd day of December, 1976.

STEPHEN D. NEELY
PIMA COUNTY ATTORNEY

Larry J. Lingeman
Deputy County Attorney

ARIZONA HAS CRIMINAL JURISDICTION OVER THE LAND IN QUESTION

Arizona has criminal jurisdiction for the act committed by William Manypenny whether the act occurred on the Organ Pipe National Monument, as all evidence indicates, or, even had it occurred on the Papago Indian Reservation. It is beyond question that a State has jurisdiction over a crime committed by a non-Indian against a non-Indian on a reservation. Williams v. Lee, 358 U.S. 217, 3 L.Ed.2d 251, 79 S.Ct. 269 (1959) and McClanahan v. State Tax Commissioner of

Arizona, 411 U.S. 164, 36 L.Ed. 2129, 93 S.Ct. 1247 (1973).

Moreover, the Arizona Supreme Court has consistently interpreted the Arizona Enabling Act 36 U.S. Stat. 569, the relevant language of which is also contained in the Arizona State Constitution, Article 20, Paragraph 4, as disclaiming only the State's proprietary interest, not its governmental interest therein.

> "We have no hesitancy in holding, therefore, that all Indian reservations in Arizona are within the political and governmental, as well as geographical, boundaries of the state, and that exception set forth in our Enabling Act applies to the Indian lands considered as property and not as a territorial area withdrawn from the sovereignty of the State of Arizona." (Citations omitted)

See, Francisco v. Arizona Supreme Court, No. 12444-PR filed September 28, 1976.

Assuming that the act occurred on the Organ Pipe National Monument, there is still no question as to Arizona's jurisdiction. The special considerations that operate to limit a State's jurisdiction for acts involving tribal Indians on Indian Reservations do not exist on land set aside for a national monument. (For a discussion of the special status of tribal indians, see Williams v. Lee, supra, and McClanahan, supra).

The term "absolute jurisdiction and control" used in the Arizona Enabling Act, does not mean exclusive jurisdiction. The United States Supreme Court has spoken directly on this issue in the Organized Village of Kake v. Egan, 369 U.S. 60, 7 L.Ed.2d 573, 82 S.Ct. 562 (1962).

> "...Indian lands in Arizona remained "under the absolute jurisdiction and control" of the United States, 36 Stat. 557, 569;

yet in Williams v. Lee, 358 U.S. 217, 220, 223, 3 L.Ed. 2d 251, 253, 255, 79 S.Ct. 269, we declared that the test of whether a state law could be applied on Indian reservations there was whether the application of that law would interfere with reservation self-government."

"...The disclaimer of right and title by the State was a disclaimer of proprietary rather than governmental interest."

"...The provision for "absolute jurisdiction and control" received little attention in Congress. In the 1954 Senate hearings the Committee was considering a provision copied from the Oklahoma statute that Indian lands should remain "subject to the jurisdiction, disposal, and control of the United States." Mr. Barney, on behalf of the Justice Department, urged the inclusion of such a provision in order to avoid the possibility that, under United States v. McBratney, 104 U.S. 621, 26 L.Ed. 869, federal criminal jurisdiction over Indian reservations might be extinguished by statehood. Senators Barrett and Jackson thereupon expressed the clear

desire that federal jurisdiction not be made exclusive over all disclaimed areas. Mr. Barney decided that the provision would deprive the State of "political jurisdiction" over disclaimed properties. Senator Cordon declared:

"The State may well waive its claim to any right or title to the lands and still have all of its political or police power with respect to the actions of people on these lands, as long as that does not affect the title to the land."

Senator Jackson said: "All that you are doing here is a disclaimer of proprietary interest," and Mr. Barney agreed. Senator Cordon said:

"The act of admission gives to the State of Alaska political jurisdiction including all that is meant by the term 'police power', within its boundaries unless there be express or definitely implied, which is the same thing, a reservation of exclusive jurisdiction in the United States."

Moreover, a careful examination of the language in the Arizona Enabling Act, shows

that the phrase "absolute jurisdiction and control" does not refer to the Federal land that makes up the Organ Pipe National Monument. That phrase only applies to the lands that make up Indian Reservations, not the "unappropriated and ungranted public lands" that make up the Organ Pipe National Monument.

> "Second. That the people inhabiting said proposed State do agree and declare that they forever disclaim all right and title to the unappropriated and ungranted public lands lying within the boundaries thereof and to all lands lying within said boundaries owned or held by any Indian or Indian tribes, the right or title to which shall have been acquired through or from the United States or any prior sovereignty, and that until the title of such Indian or Indian tribes shall have been extinguished the same shall be and remain subject to the disposition and under the absolute jurisdiction and control of the Congress of the United States. (Emphasis added)

The phrase beginning "the same" refers to "all lands lying within said boundaries owned or held by any Indian or Indian tribes...". That phrase does not refer to the "unappropriated and ungranted public lands" that make up Organ Pipe National Monument.

Therefore, even if the phrase "absolute jurisdiction and control" did not have the interpretation given it by the Arizona and United States Supreme Courts, it would not effect Arizona's jurisdiction in this case, since the phrase in question does not apply to the land that makes up the Organ Pipe National Monument.

Further, it is undisputed as evidenced by defense counsel's Motion to Dismiss on page 4, line 6 that "[i]f by the terms of the enabling act there is no relinquishment of state jurisdiction over any federal areas within the state or if the admitting act

contains on reservation of federal jurisdiction over its lands within the state, then the United States as title owner of lands within that state retains only the rights of an ordinary proprietor" Fort Leavenworth R. Co. v. Lowe, 114 U.S. 525, 5 S.Ct. 995, 29 L.Ed. 264 (1884), Collins v. Yosemite Park Co., 304 U.S. 518, 58 S.Ct. 1009, 82 L.Ed. 1502 (1937).

Thus, there is no question as to Arizona's jurisdiction over the land in question in this case.

STATE PROSECUTION OF FEDERAL OFFICERS IS PROPER.

> "It is axiomatic that the right of the States, consistently with the Constitution and laws of the United States, to make and enforce their own laws is equal to the right of the federal government to exert exclusive and supreme power in the field that by virtue of the Constitution belongs to it. The removal statute under consideration is to be construed with highest regard for such equality. Federal officers

> and employees are not, merely because they are such, granted immunity from prosecution in state courts for crimes against state law" State of Colorado v. J. Foster Symes, 286 U.S. 510, 76 L.Ed. 1253 at 1258.

This quotation from the Supreme Court of the United States articulates the right of a State to prosecute a federal officer for a violation of a state law. The case dealt with a prohibition agent arresting a suspect for a violation of a prohibition law and in so doing inflicting an injury on him by means of a blow to the head which resulted in death. The Court clearly holds that it is proper for the state to prosecute a federal officer who is acting under "color of his office" which includes acts done "under a pretense or claim of right", i.e. arrest, but "outside the scope of the officer's authority", i.e. unreasonable use of force in making an arrest.

But this is not the only case which demonstrates the right of a State to prosecute a federal officer for the violation of a state criminal statute. Brown v. Cain, 56 F.Supp. 56, cited by defense counsel indicates this as well. However, the clearest authority for the propriety of such state action is the removal statute itself. 28 U.S.C.A. § 1442 provides a procedure for handling state prosecution of federal officers and, in so doing, reflects the belief of the Federal Government that such prosecutions are proper. Frankly, the principle of state prosecution of federal officers seems so clear as to make argument on the point difficult.

It appears from defense counsel's Motion to Dismiss and subsequent Motion to Arrest Judgment on jurisdictional grounds that counsel is attempting to persuade the court that the combination of a federal officer

on federal land somehow divests the State from jurisdiction. There is no authority nor even logical rationale for such a conclusion. Indeed, counsel for the defense cites none. He does, however, cite some broad principles in the law with which the State has no argument. These propositions, nonetheless, do not answer or even shed light on the question before the court.

While there are few cases dealing with the exact issues presented by the case at bar the area is not without precedent. State v. Adams, 195 S.E. 822, 213 N.C. 243 (1938) is very much on point. That case dealt with a "Farm Agent of the Cherokee Indian Agency" with duties of "farming and looking after the farm lands of the reservation." This United States agent destroyed a cartway bridge which had been built on a Federal reservation without the consent of

the United States Government (see United States v. Colvard, 89 F.2d 312). Apparently, the bridge and road were built over Indian land, after a state condemnation proceeding, to facilitate a business operating in the area. The condemnation suit was against the Indian nation which was using the land, not against the United States Government, and eventually declared invalid in Colvard, supra. The Farm Agent, Adams, took it upon himself, prior to any court order, to destroy the bridge and roadway without authority of the United States and not in pursuance of his duties as a farm agent. Adams establishes clear precedent for the proposition that a federal officer, acting outside the scope of his authority, though on federal land, is not immune from state criminal prosecution.

ANOTHER CONSIDERATION

It is interesting, if not persuasive, to consider one other point before closing. Even assuming the Federal Government were to prosecute this case; pursuant to 18 U.S.C.A. § 13, Mr. Manypenny could stand trial on the exact charges he faced in this Court and was found guilty of violating that is, A.R.S. § 13-249 A and B. Of course, it must be determined that the state statute is different from the Federal statute to enable the Federal Prosecutor to use the State statute. Fields v. United States, 438 P.2d 205. Clearly, the State statute prohibiting assault with a "deadly weapon to wit: a gun" is different than the applicable Federal statute 18 U.S.C.A. § 113 prohibiting an assault with a "dangerous weapon". The State statute contemplates a more serious assault as evidenced by the

sentence of from five years to life. In stark contrast, the Federal statute provides a sentence of only one to five years. The State statute "more precisely fits the facts" and is therefore the proper statute to proceed under in a federal prosecution. Fields v. United States, supra. This being the case, it is apparent that a federal prosecution would be identical to a state prosecution once the case is removed to Federal court, as it was here. That is, the defendant would be prosecuted in a Tucson Federal Court under A.R.S. §13-249 A and B which is exactly what was done in this case.

The only difference would be the name of the prosecutor. In the interest of justice it would seem more proper to have a prosecutor from somewhere other than the same Justice Department which employs the defendant. It is even possible that a

special prosecutor from the local County Attorney's office would be requested and, in that event, the exact same prosecutor could conceivably try the case. But in any event, certainly the propriety of the prosecution can not turn on the title of the prosecutor assigned to the trial. Along the same lines it is noteworthy, if not ironic, that at one point during the pretrial proceedings it was argued by the defense that the U.S. Attorney should help defend the case. (See, Motion for Order Directing Attorney for Government to Enter an Appearance, filed July 22, 1976). Now, it is the defense counsel's position that this same agency, once sought in aid of the defense, should prosecute.

CONCLUSION

In the beginning of this memorandum it was conclusively demonstrated that the State does have concurrent jurisdiction over

the lands of the Organ Pipe National Monument where the shooting occurred. Secondly, the authority of the State to prosecute a federal officer was conspicuously illustrated. These areas are, in effect, the two parts of defense counsel's argument with which he hopes to persuade the Court. It is the State's position that the total of defense counsel's argument can not exceed the sum of its individual parts. Neither part of defense counsel's argument is meritorious on close inspection. The stacking of one part upon another does nothing to change this; for even in the law, zero plus zero is still zero.

Respectfully submitted this 3rd day of December, 1976.

STEPHEN D. NEELY
PIMA COUNTY ATTORNEY

_____
Larry J. Lingeman
Deputy County Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Case No. CR 76-377-TUC-WCF
(Filed December 6, 1976)

The State Of Arizona, Plaintiff,

vs.

William Dale Manypenny, Defendant

ORDER

Counsel for plaintiff has, with leave of Court, filed a motion for a rehearing on defendant's motion on arrest of judgment. He has also filed a late response to defendant's after verdict motions. He requests a hearing thereon.

The record is clear that defense counsel filed and served by mail a motion for arrest of judgment and for new trial. These Motions were noticed for hearing at 8:30 A.M., November 30, 1976, the time set for sentencing. Counsel for plaintiff failed to appear at the time set for hearing

and sentencing. He later stated to the Court that through neglect he overlooked it on his calendar and didn't arrive at his office in time to appear in Court for the scheduled hearing.

There has been no showing as to why plaintiff's counsel failed to receive copies of defendant's motions which were mailed to the office of the County Attorney.

The motion for rehearing will be treated as a motion for reconsideration of the order granting defendant's motion for arrest of judgment and dismissal of the indictment; however, no hearing time will be set. The matter can and will be reconsidered on the late memorandum, the earlier filed memoranda, the evidence and any reply or response hereafter filed by defendant. Plaintiff's counsel has waived any oral argument or further hearing by failure to timely respond and appear.

This is an ORDER denying plaintiff's request for hearing or oral argument and granting plaintiff's motion for reconsideration.

IT IS FURTHER ORDERED that the Clerk of this Court forthwith mail a copy of this Order to all counsel of record.

DATED this 6th day of December, 1976.

_____

William C. Frey
United States District Judge

JAMES D. WHITNEY
4727 East Fifth Street
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(602) 327-6813
Attorney for Defendant

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Case No. CR-76-377-TUC-WCF
(Filed September 9, 1977)

The State of Arizona, Plaintiff

vs.

William Dale Manypenny, Defendant

MOTION FOR STATUS HEARING

The above named Defendant WILLIAM D. MANYPENNY respectfully moves the Court for a hearing to determine the status of the Motion for Reconsideration made subsequent to the dismissal of the indictment and the granting of the Motion in Arrest of Judgment. The Motion for Reconsideration has bee under advisement by the Court for a lengthy period of time and Defendant cannot obtain employment of any substantial nature because of the continued pendency of the action.

DATED this 8th day of September, 1977.

JAMES D. WHITNEY
Attorney for Defendant

A copy of the foregoing mailed
this 8th day of September, 1977,
by certified mail, return receipt
to:

Daniel Smith
Deputy County Attorney
9th Floor, Pima County Courts Bldg.
Tucson, Arizona 85701

James D. Whitney

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NO. 98645

STATE OF ARIZONA, PETITIONER

V.

WILLIAM DALE MANYPENNY, RESPONDENT

RESPONSE TO

PETITION FOR A WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS FOR

THE NINTH CIRCUIT

JAMES D. WHITNEY
Attorney for Respondent
Suite 219
655 North Alvernon Way
Tucson, Arizona 85711

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NO. 98645

STATE OF ARIZONA, PETITIONER

V.

WILLIAM DALE MANYPENNY, RESPONDENT

RESPONSE TO

PETITION FOR A WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS FOR

THE NINTH CIRCUIT

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INDEX

	Page
Prefatory notes	1
Reasons for denying the writ	2
Conclusion	23

CITATIONS

Cases:

Brown v. Cain, 56 F. Supp 56 (D.C. Pa - 1944)	22
Carroll v. United States, 354 U.S. 394, 400, 77 S. Ct. 1332, 1336, 1 L. Ed 2d 1442 (1957)	10
Deddens v. Cochise County, 113 Ariz. 75, 546 P. 2d 811 (1976)	24
Duncan v. Truman, 248 P. 2d 879 (1953)	17
Erie Railroad v. Tompkins, 304 U.S. 64 (1938)	2
Government of Virgin Islands v. Hamilton, 475 F. 2d 529 (CA3-1973)	4
Kappens Co. v. Continental Casualty Co., 337 F. 2d 499, 501-502 (CA8-1964)	5

Cases--continued Page

Peters v. Frye, 223 P. 2d 176, 180, Ariz. (1950) 16,18

State ex rel Dawson v. Superior Court, 112 Ariz. 123, 538 P. 2d 397 (1975) 13,15

State v. Allen, 27 Ariz. App. 377, 557 P. 2d 176 (1976) 13,14

State v. Gasonette, 95 Ariz. 234, 388 p. 2d 809 (1964) 8

State v. Hunt, 8 Ariz. App. 514, 447 p. 2d 896, 904 12

State v. White, 27 Ariz. App. 213, 553 p. 2d 246, 247-268 (1976) 7

State v. Whitney, 108 Ariz. 277, 496 p. 2d 139 (1972) 8

United States v. Best, 573 F. 2d 1095 (CA9-1978) 3

United States v. Craine, 589 F. 2d 996 (CA9-1979) 3

United States v. Hines, 419 F. 2d 173 (CA10-1970) 10

Cases--Continued Page

United States v. Martin Linen Supply Co., 430 U.S. 564, 574 (1977) . . 19,20

United States v. Scott, 437 U.S. 82 (1978) 19,20

United States v. Wilson, 420 U.S. 332 (1975) 10,11

Constitution, statutes and rules:

United States Constitution:

Fifth Amendment 18

18 U.S.C. 43 4

18 U.S.C. 3731 3,4,10

28 U.S.C. 1291 2,9,10,12

28 U.S.C. 1442 24

A.R.S. 1-215(32) 4

A.R.S. 1-215(34) 4

A.R.S. 12-2001 15

A.R.S. 13-1711 7

Constitution, statutes and rules--
continued Page

A.R.S. 13-1712 (5) 7,14

A.R.S. 13-1713 6

Arizona Rules of Criminal Procedure . . . 13

Rules of Procedures for Special
Action 15,16

PREFATORY NOTES

The facts necessary to determine the question of jurisdiction of the Court of Appeals have been correctly recited. Since a reversal of the Court of Appeals by this court will occasion a remand for the consideration of the majority, no facts are recited dealing with the merits of Judge William C. Frey's decision. This Court is being asked solely to consider the ability of an appellate court to entertain this appeal.

Reference to the Petition for Writ of Certiorari are made by the designation "Pet." and the record of the trial court by "CR."

REASONS FOR DENYING THE WRIT

This court should not grant the petition for writ of certiorari and review this case. The Court of Appeals, Ninth Circuit, has rightly held that the State's right of appeal must be expressed by Federal statute and cannot arise by implication under Section 28, U.S.C. 1291 or by adoption under Erie Railroad v. Tompkins, 304 U.S. 64 (1938).

The majority bases its decision of lack of jurisdiction of subject matter appeal on a principle of Federal criminal law: That there must be an expression of Congressional intent that jurisdiction exist in the Federal court. Pet. 5a et. seq. For this proposition, the Ninth Circuit relied upon two principal sources, the lack of Federal statutory appeal and the

and the designation of the "United States" only in 18 U.S.C. §3731.

United States v. Best, 573 F. 2d 1095 (CA9-1978) is best illustrative of the majority opinion. In Best the Ninth Circuit emphasized the Congressional intent to yield to state jurisdiction, and in the absence of Federal legislation creating jurisdiction, Federal entities could not extend their jurisdiction. Id. 1099. Judge Choy, speaking for the majority, fairly discussed those cases which adopted the state law in the absence of Federal statute. Pet. 7a, et. seq. United States v. Craine, 589 F. 2d 996 (CA9-1979). However, in instances of criminal jurisdiction in Federal courts, only specific statutory authority can create a right of appeal. Pet. 5a:

> It is well-settled that the prosecution has no right to appeal an adverse decision absent some statutory authority.

As has been amply demonstrated by the majority, Congress did not provide for an appeal in a removal action. Pet. 13a-14a.

Nor can the state avail itself of the statutory provisions granting the "United States" a right of appeal. 18 U.S.C. 3731. The United States is the party given the right to appeal in the Federal judicial system by Congressional mandate and not by the State of Arizona. By definition applied by Congress in numerous statutes and by the Arizona Revised Statutes, "state" and "United States" are entirely different entities. AR. S. §1-215(32); A.R.S. §1-215(34); 18 U.S.C. §43; Government of Virgin Islands v. Hamilton. 475 F. 2d 529 (CA3-1973).

If, indeed, the state law should be applied in determining the state's right of appeal, the Federal Court of Appeals in its decision could not confer upon the state any right greater than that available under the laws of the state:

> Removal gives the Federal court only derivative jurisdiction. This is no better than that possessed by the state court in which the action was commenced. Thus, if jurisdiction is lacking in the state court in the first instance, it is not brought into being by removal, even though the Federal court to which the suit was removed would have had jurisdiction had the action originated there. Kappens Co. v. Continental Casualty Co., 337 F. 2d 499, 501-502 (CA8-1964) (Emphasis added).

The state law provides no right of appeal from a judgment of acquittal entered by the Court and no right should be conferred upon the

state by the appeals court or by this court. Only the right of appeal from judgment of conviction is conferred upon the defendent: "An appeal may be taken by the defendant only from: 1. A final judgment of conviction." A.R.S. 13-1713.

There is no provision for an appeal by the state from a judgment of acquittal and the recognition of the right in the defendant amply demonstrates that the state legislature fully distinguished a "judgment" from an "order." Judge Kennedy's pronouncement in his dissent (Pet. 38a) that the words "judgment" and "order" are used interchangeably in the statutes is totally without basis. Such a construction by the dissent accomplishes nothing, since a state's appeal right is "An order made after

judgment affecting the substantial rights of the state." A.R.S. 13-1712 (5). There is no judgment after judgment or order after judgment in the present case to be appealed.

Without exception the courts of Arizona have held that in the absence of an appellate right conferred by statute, the courts would not create one:

> ...the only right of appeal granted to either party in criminal cases is that extended by A.R.S. Section 13-1711...
>
> ...
>
> The provisions of Section 17-1712 limit this right of appeal to certain specified orders and rulings. State v. White, 27 Ariz. App. 213, 553 p. 2d 246, 247-278 (1976)

Even more emphatically, the Arizona Supreme Court has stated the rule applied in state court:

> The right of appeal in criminal cases was unknown to the common law...It is purely statutory and does not exist in absence of statute...There is no provision either in Arizona's Constitution, by statute or criminal rule which permits an appeal to the Superior Court or to this Court from a denial of a Motion to Dismiss a Criminal Complaint. State v. Whitney, 108 Ariz. 277, 496 p. 2d 139 (1972). See also State v. Gasonette, 95 Ariz. 234, 388 p. 2d 809 (1964).

Judge Kennedy in his dissent and the prosecution in its petition dwell long and emotionally on the principles of federalism. Pet. pp. 25-27, 16a-17a. Yet, there appears no statutory citation of authority for the filing of an appeal in state court from a judgment of acquittal. The interests of federalism are not promoted by conferring upon the state prosecution a right of

appeal not recognized by its own legislature and thus placing a substantial burden upon any Federal officer seeking to remove his case to the Federal judicial system. The removal statutes were not intended to subordinate the principles of statutory review to the exigencies of judicial preference. The removal statutes have served an historically vital part in the divisions of the two sovereigns and the practical inhibition suggested by the court is unacceptable.

The dissent and the prosecution would justify an appeal by the State under the provisions of 28 U.S.C. §1291. Pet. 24 & 25; 21a and 22a. The language of 28 U.S.C. §1291 nowhere gives express authority to the state to appeal. The cases construing the United States criminal appellate remedies demonstrate the

concern that the right of the prosecution to appeal is unequivocally derived from express statutory authority.

> The government is initially faced with "the concept that in the Federal jurisdiction*** appeals by the government in criminal cases are something unusual, exceptional, not favored." Carroll v. United States, 354 U.S. 394, 400, 77 S. Ct. 1332, 1336, 1 L. Ed 2d 1442 (1957). Indeed, the United States is denied the right of appeal in criminal cases absent express statutory sanction. There is no express authorization in 28 U.S.C. §1291 and the government's only statutory created right of appeal in criminal cases is given by 18 U.S.C. §3731. United States v. Hines, 419 F. 2d 173 (CA10-1970) (Footnotes omitted) CF. United States v. Wilson, 420 U.S. 332 (1975)

A statute which can not serve as a vehicle for appeal for the United States should not be used to permit a state appeal, particularly, when such an appeal is denied by the state of origin.

As is pointed out in the majority opinion in the Order granting Rehearing (Pet. 12a & 13a), the legislative history supports the view that Congress never intended that the rights afforded the United States could by implication confer a right upon the several states. The argument of the dissent that in the absence of express authority to the contrary the right should be assumed is in opposition to all state and federal law. Pet. 16a. United States v. Wilson, 420 U.S. 332, 336 (1975).

The argument that the state may appeal under 28 U.S.C. 1291 while the United States must have express statutory authority, ignores the express prohibition against such activity by the Arizona Courts. State v. Hunt, 8 Ariz. App. 514, 477 p. 2d 896, 904. State v. Hunt, supra, held that even when the defendant had appealed, no right of cross appeal existed challenging a judgment of acquittal entered by the trial court. Id. This Court should not entertain a review of a judgment wholly beyond the purview of state and federal appellate jurisdictions. The lack of Congressional consideration should not be the signal for a judicial expansion of federal statutory law. Pet. 8a-9a.

The cases cited by the dissent for the proposition that the State has a right of review

are inapposite. State ex rel Dawson v. Superior Court, 112 Ariz. 123, 538 P. 2d 397 (1975) involves the trial court enforcing a time limit in ruling upon a motion for judgment of acquittal under the provisions of Rule 20, Arizona Rules of Criminal Procedure which prohibits the court from taking under advisement (reserving) a decision on defendant's motions. The trial court had reserved a decision on the motions in clear contravention of the rule. The review by the court was not of the merits but of contravening the time limitations.

State v. Allen, 27 Ariz. App. 377, 557 P. 2d 176 (1976) does not decide the question of jurisdiction of the court to consider the propriety of the Court of Appeals of Arizona's review of a judgment of acquittal. The trial

court had entered a judgment of conviction and sentence on remand from a special action. Id. 177. The right of the state to appeal the action is nowhere discussed in the opinion cited by the defense but is amply provided by statute as:

> A.R.S. 13-1712
>
> An appeal may be taken by the state from:
>
> 5. An order made after judgment affecting the substantial rights of the state. (Emphasis added)

There is no showing that the jurisdiction special action which preceded the appeal was tested and the Court may well have assumed jurisdiction. The basis could well have been that the trial court took the initial motion for

judgment of acquittal under advisement. Dawson v. Superior Court, supra.

The provisions for a special action (previously writs of mandamus, etc.) are not a substitute for appeal. The standards set forth for the special actions are now formalized in a written rule, in pertinent part as follows:

> The only questions that may be raised in a special action are:
> ***
> (c) Whether a determination was arbitrary or capricious or an abuse of discretion.
> Rules of Procedures for Special Action, Rule 3.

The special actions are conceived in the rules as embracing the extraordinary writs as previously set forth by statute (A.R.S. 12-2001 et. seq.) and are limited:

> ...nothing in these rules shall be construed as enlarging the

> scope of the relief traditionally granted under the writs of certiorari, mandamus and prohibition. Rules of Procedure for Special Actions. Rule 1(a)

The traditional role of the examination of abuse of discretion in the extraordinary writs is strictly limited and does not embrace an appellate review of the facts or the correctness of a decision:

> "The general rule is that if the action of a public officer is discretionary that discretion may not be controlled by mandamus. The rule, however, is qualified by the provision that if it clearly appears that the officer has acted arbitrarily and unjustly and in abuse of discretion, the action may still be brought." Peters v. Frye, 223 P. 2d 176, 180, Ariz. (1950). (Emphasis added)

And what the nature of that abuse must be is described later in the opinion:

> "Yet, if the case presented is one where the decision has been in such flat opposition to the facts as to force the conclusion that the decision was in bad faith, a review by the courts will always be open to the aggrieved party..." Id. 180. Specifically on writs of certiorari see Duncan v. Truman, 248 P. 2d 879 (1953).

If there then is a right of review by certiorari or other extraordinary writ, then, the record does not support the conclusion that Judge Frey's actions in the Court below constituted actions tantamount to "bad faith." Nowhere does the dissent draw such a conclusion.

The dissent does not contend that such abuse exists, only that "...I think the evidence introduced at the first trial may have permitted a reasonable inference that the defendant was not executing his duties in good faith." Pet. 32a.

(Emphasis added). This does not remotely approach the standards of "bad faith" enunciated by the Arizona appellate courts. Peters v. Frye, supra. This Court should approach this question carefully lest a new method of review be imposed upon the state contrary to its concepts of extraordinary relief.

Assuming an appeal or other review is available, this Court must address the question of jeopardy under the 5th Amendment to the Constitution. There is probably no area currently more confused, whether on the state or federal level. Nor has this writer found any Supreme Court decisions directly applicable to the present case. This Court has held alternatively that (1) the constitutional significance of double jeopardy should not depend upon the

timing of the motion, United States v. Martin Linen Supply Co., 430 U.S. 564, 574 (1977) and (2) the point at which the judgment of acquittal under Rule 29 is entered, i.e., before or after verdict is vital to the issue of jeopardy United States v. Scott, 437 U.S. 82 (1978).

These two cases are illustrative of the lines drawn by the opposing views of this Court and we would respectfully submit that the artificial strictness of chronology should not govern this Court but, rather, the function of the Court in Rule 29 be exercised as conceived by Congress. The question should be: Does the decision of the trial court reach the sufficiency of the evidence or is the ruling upon a legal impediment. This Court in United States v. Martin Linen Supply Co., supra, rejected the

artificial determinative of time:

> ...Rule 29 contemplated no such artificial distinctions. Rather the differentiations in timing were intentionally incorporated into the Rule to afford a trial judge the maximum opportunity to consider with care a pending acquittal motion. Id. 574.

This Court need not and should not reach this question. The conflict in the Court on the question of jeopardy is apparent in United States v. Scott, supra, and companion cases. See dissent of Justice Brennan, Id. 101, et. seq.

Finally, the dissent has held that the question of immunity was not raised until the time of the states hearing on the district court's rehearing of the Motion in Arrest of Judgment. Pet. 31a. If the dissent intends this statement to act as a criticism for

failure to use the word "immunity" then such rebuke is warranted. However, if the dissent intends the statement as a failure to raise the intrinsic and substantive issues attendant to the label of "immunity," such a conclusion is totally unsupported in the record.

The issue of the inability of the state to interfere with the acts of a federal officer in the performance of his duties on a federal reservation was raised in the Motion to Dismiss prior to trial (CR 73 & 78) and in all pleadings and oral motions, including the Motion in Arrest of Judgment, subsequent to the first motion, defendant sought relief on this basis.

The issue was raised prior to trial if the state has the right to try a federal officer

The principal case relied upon as being most appropos was Brown v. Cain, 56 F. Supp 56 (D.C. Pa - 1944), which holds after the discussion of immunity (Id. 58-59):

> I have no doubt that a guard in the service of the United States, protecting the plant of a vital war industry, who, in the performance of his duty, does an act for which the state authorities propose to prosecute him, should be held amenable to the law of the United States and to no other. Id. 60. CR 73, 78.

That the shibboleth of "immunity" was not incanted is admitted. That the issue of immunity and the federal government's supremacy in this field of immigration was raised is strongly supported by the record.

CONCLUSION

Unavoidably, the foregoing argument has been directed both at the points raised by the state and by Kennedy, J., in his dissent.

The issue of appellate jurisdiction has been an issue since the outset of appeal. The question was first raised by the defendant in a motion prior to the filing of briefs. The state chose to stand on its right of appeal while its brief at this late date speaks to the conversion of the proceeding from an appeal to a writ. The cases cited for this proposition demand a standard of "gross abuse of discretion" (Pet. 45) for federal review and an abuse of discretion amounting to "bad faith" in the state arena. Neither the state nor Judge Kennedy has addressed this quantum of abuse and this court should not entertain it.

If the case were in a similar posture in the state judicial system, the courts would no doubt hold that such a proceeding (special action) had ever been waived by inaction. Deddens v. Cochise County, 113 Ariz. 75, 546 P. 2d 811 (1976). Surely, a similar condition exists in the federal system after two years in the Court of Appeals.

The granting of a writ of certiorari will only serve to evade a clear principle of the statutory requirement for criminal appellate review. Further, it will burden the federal officer within the meaning of 28 U.S.C. §1442 with unacceptable risks in the exercise of his statutory right of removal.

On the bases set forth above and others cited in the body of this brief, Defendant/

Respondent respectfully submits that certiorari should be denied.

Respectfully submitted this 7th day of December 1979.

JAMES D. WHITNEY
Attorney for Defendant/
Respondent

No. 79-621

In the Supreme Court of the United States

OCTOBER TERM, 1979

STATE OF ARIZONA, PETITIONER

v.

WILLIAM DALE MANYPENNY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

WADE H. MCCREE, JR.
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INDEX

Page

Question presented 1

Statement 2

Discussion 4

Conclusion 10

CITATIONS

Cases:

Arizona ex rel. Dawson v. *Superior Court*, 112 Ariz. 123, 538 P.2d 397 7

Carroll v. *United States*, 354 U.S. 394 5

Colorado v. *Symes*, 286 U.S. 510 7

Grand Jury Empanelled February 14, 1978, In re, 597 F.2d 851 5

Maryland v. *Soper*, 270 U.S. 9 7

State v. *Gradillas*, 25 Ariz. App. 510, 544 P.2d 1111 7

State ex rel. Hyder v. *Superior Court*, No. 14579 (Ariz. Jan. 16, 1980) 7

Tennessee v. *Davis*, 100 U.S. 257 7

United States v. *Martin Linen Supply Co.*, 430 U.S. 564 8

United States v. *Sanges*, 144 U.S. 310 4

United States v. *Sisson*, 399 U.S. 267 8

United States v. *Wilson*, 420 U.S. 332 5

Willingham v. *Morgan*, 395 U.S. 402 8

Page

Constitution, statutes and rules:

United States Constitution, Fifth Amendment, Double Jeopardy Clause 5, 8

18 U.S.C. 3731 ..... 3, 4, 5, 6, 8, 9, 10

28 U.S.C. 1291 ..... 4, 5, 6, 8, 9, 10

28 U.S.C. 1442 4

28 U.S.C. 1442(a)(1) 1, 2, 3

28 U.S.C. 2254 5

28 U.S.C. 2255 5

Ariz. Rev. Stat. Ann :

§ 12-2001 (1956) 7

§ 13-249(A) (1976) 2

§ 13-249(B) (1976) 2

§ 13-4032 (1978) 6

§ 13-4032(5) (1978) 6

Federal Rules of Criminal Procedure:

Rule 29(c) 2, 8

Rule 33 2

Rule 34 2

Miscellaneous:

41 Cong. Rec. 2192 (1907) 8

S. Rep. No. 1296, 91st Cong., 2d Sess. (1970) 9

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STATE OF ARIZONA, PETITIONER

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

On January 7, 1980, the Court invited the views of the Solicitor General concerning this case.

QUESTION PRESENTED

Whether a state may appeal from a post-guilty-verdict judgment of acquittal in a criminal proceeding that was removed by the defendant to federal court pursuant to 28 U.S.C. 1442(a)(1).[1]

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[1]Petitioner has also asked the Court to review the question of whether the district court had jurisdiction to enter a judgment of acquittal on its own motion eleven months after the jury returned a verdict of guilty (Pet. 3-4, 32-37). Because of its finding on the jurisdictional issue, the court of appeals did not reach this issue, and we assume that this Court would not reach it even if it resolves the issue of appellate jurisdiction in petitioner's favor. Accordingly, we do not address it here.

STATEMENT

Respondent was indicted in the Superior Court of Pima County, Arizona, for assault with a deadly weapon, in violation of Ariz. Rev. Stat. Ann. § 13-249(A) and (B) (1976). Because the charge arose from an act that he committed while on duty as a Border Patrol Agent of the United States Immigration and Naturalization Service, respondent removed the case to the United States District Court for the District of Arizona pursuant to 28 U.S.C. 1442(a)(1). The case was tried before a jury, which returned a verdict of guilty.[2] Respondent then moved for arrest of judgment under Rule 34, Fed. R. Crim. P., or alternatively, for a new trial under Rule 33, Fed. R. Crim. P. (Pet. App. 4a). The district court initially granted the motion for arrest of judgment, but on reconsideration it reversed the order arresting judgment (Pet. App. 42a, 57a).[3] However, the court construed respondent's motion as a motion for acquittal under Rule 29(c), Fed. R. Crim. P., and entered a judgment of acquittal because of its

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[2]The evidence at trial showed that respondent encountered three unarmed illegal aliens while he was patrolling an area near the border between Arizona and Mexico. When one of the aliens turned and ran back toward the Mexican border, respondent shot him in the back, severing his spinal cord (Pet. 7-8; Pet. App. 33a-34a).

[3]The district court had found that the State of Arizona had no criminal jurisdiction over the federal land where the event occurred. On reconsideration, the court determined that Arizona did have criminal jurisdiction over the territory in question (Pet. App. 41a-49a).

failure to consider the issue of respondent's immunity as a federal officer carrying out his duties, which the court deemed "fundamental error" (Pet. App. 54a-57a).[4]

Petitioner appealed, invoking 18 U.S.C. 3731 as the basis for appellate jurisdiction.[5] The court of appeals dismissed the appeal for lack of jurisdiction, concluding that petitioner could not appeal from an adverse decision in a criminal case absent express statutory authorization (Pet. App. 3a-14a). The court held that 18 U.S.C. 3731 authorizes appeals only when the federal government is the prosecutor not when a state prosecution is removed to federal court pursuant to 28 U.S.C. 1442(a)(1) (Pet. App. 6a-9a). The court refused to consider whether Arizona law authorized an appeal, concluding that "only Congress can authorize an appeal by a state in a § 1442(a)(1) criminal prosecution" and that Congress has not done so (Pet. App. 9a-11a). Judge Kennedy dissented (Pet. App. 15a-38a).

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[4]Respondent had not raised an immunity defense at trial (Pet. App. 31a). Consequently, petitioner did not introduce evidence designed to overcome such a defense. The district court found, however, that the immunity defense was established (Pet. App. 44a). The court then concluded that it had erred either in failing to determine itself whether respondent honestly believed that his actions were reasonable in discharging his federal duties, or in failing to submit the case to the jury with instructions to decide that issue. It is not evident why this error, if error it was, would justify an acquittal rather than a new trial.

[5]18 U.S.C. 3731 provides in pertinent part:

> In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.

DISCUSSION

The decision in this case creates a serious anomaly in the administration of the federal courts. Under this decision, a state may never appeal from an adverse decision in a criminal prosecution that has been removed to federal court under 28 U.S.C. 1442. This is true even in situations where the federal government clearly could appeal under 18 U.S.C. 3731 if it were the prosecutor and where the state could have appealed under state law had the case not been removed to federal court. The court of appeals itself noted that its decision was contrary to the policy of Section 3731 and would have "a substantial effect on the delicate balance of our federal system" (Pet. App. 8a). The court concluded, however, that no statute authorized such an appeal by the state. We submit that the court of appeals was mistaken; either of two statutes authorizes such an appeal.

1. There is no doubt that the language of 28 U.S.C. 1291 authorizes the appeal taken in this case. It provides: "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States * * *." The court of appeals, however, held that this language does not apply to appeals taken by the prosecution in a criminal case (Pet. App. 13a n.3). This is a limitation that is found nowhere in the statute or history of 28 U.S.C. 1291. The source cited for this limitation is *United States* v. *Sanges*, 144 U.S. 310 (1892). That case, however, simply held that, because criminal appeals by the prosecution had historically been expressly authorized by the sovereign, the Court would not read 28 U.S.C. 1291 to authorize an appeal by the *United States* of a criminal case. As the legislative body of the United States, it is for Congress to decide whether, as a policy matter, the United States should be permitted to appeal adverse

decisions in prosecutions. But *Sanges* did not limit the applicability of 28 U.S.C. 1291 to any party other than the United States, such as a criminal defendant or, as here, a state prosecuting a case that has been removed.

Even if *Sanges* can be read to establish the broader proposition that 28 U.S.C. 1291 should not be construed to include any prosecutorial appeals unless Congress indicates a contrary policy, it is clear that Congress has expressed such a policy in the Criminal Appeals Act of 1907 and in the present version of 18 U.S.C. 3731 enacted in 1971. There could be no more emphatic rejection of the rationale underlying *Sanges* than the 1971 version of 18 U.S.C. 3731, which permits appeals of all district court orders dismissing an indictment that are not barred by the Double Jeopardy Clause. This statute clearly represents Congressional recognition that the rights of criminal defendants in this area are adequately protected by the Constitution and a Congressional intent not to interpose statutory barriers to prosecution appeals. See *United States* v. *Wilson*, 420 U.S. 332, 336-339 (1975).[6]

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[6]The practice under 28 U.S.C. 1291 does not restrict its application to civil cases. Criminal defendants appeal from their convictions under 28 U.S.C. 1291. The prosecution may appeal from adverse decisions in cases arising under 28 U.S.C. 2254 and 28 U.S.C. 2255, even though they are criminal in nature. Orders relating to grand jury proceedings have also been held to be appealable under Section 1291. See, *e.g.*, *In re Grand Jury Empanelled February 14, 1978*, 597 F. 2d 851, 857-858 (3d Cir. 1979). Thus it is clear that the limitation on the right to appeal under Section 1291 is only that narrow limitation imposed by *Sanges*. Indeed, this Court has suggested that even the United States may appeal certain orders related to a criminal case under 28 U.S.C. 1291. *Carroll* v. *United States*, 354 U.S. 394, 403 (1957).

To the extent *Sanges* has any continuing vitality, it could only be that 28 U.S.C. 1291 does not authorize a prosecutorial appeal unless the sovereign that is the prosecuting entity affirmatively permits it as a policy matter. For the United States, that policy decision is made by Congress and is embodied in 18 U.S.C. 3731. For a state, that policy decision is made by the state legislature and is expressed in the state law. If *Sanges* limits the scope of 28 U.S.C. 1291 in this fashion, states would not be able to appeal all adverse decisions in cases that have been removed to federal court, but only those that would have been appealable under state law had the case not been removed. In this case, however, it is not necessary to resolve whether 28 U.S.C. 1291 is limited in this fashion because, as the dissent noted (Pet. App. 23a-24a), Arizona law authorizes the appeal that was taken in this case.

Arizona law permits the prosecution to appeal from an "order made after judgment affecting the substantial rights of the state." Ariz. Rev. Stat. Ann. § 13-4032(5) (1978).[7] Respondent suggests that this section would not

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[7]Ariz. Rev. Stat. Ann. § 13-4032 (1978), provides in pertinent part:

An appeal may be taken by the state from:

1. An order quashing an indictment or information or count thereof.

2. An order granting a new trial.

3. An order arresting judgment.

4. A ruling on a question of law adverse to the state when the defendant was convicted and appeals from the judgment.

5. An order made after judgment affecting the substantial rights of the state.

6. The sentence on the grounds that it is illegal, or if the sentence imposed is other than the presumptive sentence authorized by §13-604 or § 13-701.

7. An order granting a motion to suppress the use of evidence.

apply here because it refers only to "orders," not "judgments" of acquittal (Br. in Opp. 6-7). As the dissent found, however, these two terms are generally synonymous under Arizona law (Pet. App. 37a-38a n.3). Indeed, in a case that seems indistinguishable from the one at bar, the Arizona Supreme Court recently vacated a judgment of acquittal entered after verdict. *State ex rel. Hyder* v. *Superior Court*, No. 14579 (Ariz. Jan. 16, 1980). Moreover, the trial court's action in this case would be subject to appellate review under the Arizona Supreme Court's certiorari powers. Ariz. Rev. Stat. Ann. § 12-2001 (1956). See *State* v. *Allen*, 27 Ariz. App. 577, 557 P. 2d 176 (1976). See also *Arizona ex rel. Dawson* v. *Superior Court*, 112 Ariz. 123, 538 P. 2d 397 (1975); *State* v. *Gradillas*, 25 Ariz. App. 510, 544 P. 2d 1111 (1976).

Denying Arizona a right to appeal that it would have had in its own courts simply because the defendant is a federal officer entitled to remove the prosecution to federal court is a consequence of removal that raises a delicate issue of federalism, particularly when the federal government does have a right to appeal. Yet none of the purposes of the removal statute are advanced by such a rule. The removal statute was intended to safeguard individuals acting under color of federal law from prosecution by the states for acts that may have been performed within the scope of their authority as federal officers. See *Tennessee* v. *Davis*, 100 U.S. 257 (1879); *Colorado* v. *Symes*, 286 U.S. 510, 517 (1932). Its constitutional validity "rests on the right and power of the United States to secure the efficient execution of its laws and to prevent interference therewith, due to possible local prejudice, by state prosecutions instituted against federal officers in enforcing such laws." *Maryland* v. *Soper*, 270 U.S. 9, 32 (1926). The statute is also designed

to provide a forum for a defense based on official immunity, free from the possibility of local bias. *Willingham* v. *Morgan*, 395 U.S. 402, 407 (1969). The decision of the court of appeals relates to none of these interests; it merely provides a windfall benefit to a defendant who happens to be a federal officer.

2. If Section 1291 is construed not to authorize the appeal taken in this case, the appeal should be permitted under 18 U.S.C. 3731.[8] The legislative history of the Criminal Appeals Act of 1907, the predecessor to the present 18 U.S.C. 3731, is examined in *United States* v. *Sisson*, 399 U.S. 267, 293-296 (1969). Efforts to pass such legislation began in 1892, when the *Sanges* case was decided. The language of the Act does specifically refer to the "United States," but there is nothing in the history of the 1907 Act or the 1971 enactment of Section 3731 that suggests that Congress believed that a distinction should be drawn between federal and state prosecutions. The purpose of the Act was to control the unreviewable power of one district court judge to end a prosecution, a consideration that should apply equally to state or federal prosecutions.[9] See 41 Cong. Rec. 2192 (1907). Congress gave no specific consideration to the right of appeal of a state prosecuting in federal court, although the frequent references in the legislative history to "Government" appeals suggest that Congress would have

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[8]It is apparent that Section 3731 would authorize the appeal if this were a federal prosecution. Appeals of all judgments of acquittal entered under Fed. R. Crim. P. 29(c) are permitted unless they are barred by the Double Jeopardy Clause. *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564, 568 (1977). It is not contended by respondent or by the court of appeals that this appeal violates the Constitution.

[9]18 U.S.C. 3731 specifically provides that "[t]he provisions of this section shall be liberally construed to effectuate its purposes."

treated the states just as the United States, if Congress had felt that state appeals would be barred unless authorized in Section 3731. See, *e.g.*, S. Rep. No. 1296, 91st Cong., 2d Sess. 2 (1970).

It seems plain that Section 3731, passed in response to the *Sanges* decision, spoke in terms of the "United States" simply because it was appeals by the "United States" that *Sanges* had held not to be authorized by Section 1291 in the absence of a specific enactment by Congress. As we have suggested above, this decision in *Sanges* should not be construed to restrict appeals by states. If the meaning of "United States" in *Sanges* is stretched to include individual states, however, then "United States" in Section 3731 should be given the same construction, and Section 3731 should be held to authorize the appeal here.

3. Cases might arise in which a state seeks to appeal an order in a removed case that would not have been appealable by the United States under Section 3731. In such an instance, the existence of appellate jurisdiction might turn upon whether the state's right to appeal is found in Section 1291 or Section 3731. Similarly, cases might arise in which the challenged order would not have been reviewable in a state appellate court at the prosecution's behest, but would be reviewable in a federal appellate court upon appeal by the United States in a federal prosecution. Such a case would also present difficult problems regarding the scope of these two provisions.

In the instant case, however, it is clear that the United States could have appealed the judgment of acquittal had this been a federal prosecution and that the Arizona courts would have had jurisdiction to entertain the State's appeal had the case not been removed, and had a similar

order been entered by a state trial judge. Since the existence and scope of the appellate jurisdiction is not affected by the question whether the appeal lies under Section 1291 or Section 3731, there is no occasion in this case to address any of the questions outlined above, which could be dispositive only in other, hypothetical cases not before the Court. That the State of Arizona had a right to appeal in this case seems to us clear, and the court of appeals should accordingly have entertained its appeal on the merits.

CONCLUSION

The issue presented in this case is one that is not likely to recur with great frequency. However, the question of the status of a state when a prosecution has been removed from its courts to the federal courts is one that does implicate serious federalism concerns that go beyond the specifics of this case. In view of the serious anomaly created by this decision, it is our view that the petition for a writ of certiorari should be granted and the judgment of the court of appeals reversed.

Respectfully submitted.

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MARCH 1980

DOJ-1980-03

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-621

STATE OF ARIZONA, PETITIONER

v.

WILLIAM DALE MANYPENNY

ON WRIT OF CERTIORARI TO THE
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THE NINTH CIRCUIT

BRIEF FOR THE STATE OF ARIZONA

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INDEX

	Page
Opinions Below.	1
Jurisdiction.	2
Questions Presented	3
Constitutional and Statutory Provisions Involved	3
Statement	7
Summary of Argument	
I.	21
II.	29
Argument I.	32
A STATE GOVERNMENT IS NOT REDUCED TO SECOND CLASS STATUS AND STRIPPED OF ITS RIGHT TO APPEAL WHEN A STATE CRIMINAL PROSECUTION IS REMOVED TO FEDERAL DISTRICT COURT	32
A. FEDERAL COURTS MUST APPLY THE SUBSTANTIVE LAW OF THE STATE AND FEDERAL PROCEDURE IN A REMOVAL PROSECUTION; IRRESPECTIVE OF WHETHER THE GOVERNMENT'S RIGHT TO APPEAL IS DEEMED SUBSTANTIVE OR PROCEDURAL, THE STATE OF ARIZONA HAS A RIGHT TO APPEAL IN THIS CASE	32

Page

B. CONGRESS DID NOT INTEND TO PRECLUDE APPEALS BY STATE GOVERNMENTS IN REMOVAL CASES WHEN IT ENACTED 18 U.S.C. 3731. . . 37

C. 28 U.S.C. 1291 PROVIDES FOR REVIEW OF "ALL FINAL DECISIONS OF THE DISTRICT COURTS OF THE UNITED STATES. . ."; IT PROVIDES A SECOND JURISDICTIONAL BASIS FOR THIS APPEAL 29

D. FEDERALISM CONSIDERATIONS AND THE TENTH AMENDMENT IMPELS THIS COURT TO CONSTRUE 18 U.S.C. 3731 OR 28 U.S.C. 1291 AS ALLOWING THE STATE THE RIGHT TO APPEAL; OTHERWISE 28 U.S.C. 1442(a)(1) AND 18 U.S.C. 3731 ARE VULNERABLE TO CONSTITUTIONAL ATTACK . . . 59

E. 28 U.S.C. 1651 PROVIDES THE COURT OF APPEALS WITH JURISDICTION TO CONSIDER PETITIONER'S CONTENTION THAT THE DISTRICT COURT WAS WITHOUT JURISDICTION TO SUA SPONTE ENTER A JUDGMENT OF ACQUITTAL ELEVEN MONTHS AFTER THE JURY FOUND RESPONDENT GUILTY 73

Page

Argument II 79

THE DISTRICT COURT HAD NO JURISDICTION TO SUA SPONTE ORDER A JUDGMENT OF ACQUITTAL ELEVEN MONTHS AFTER A JURY CONVICTED RESPONDENT 79

Conclusion. 94

History of "The Act For The Impartial Administration of Justice". 95

CITATIONS

Cases	Page
Aptheker v. Secretary of State, 378 U.S. 500.	61
Benton v. Maryland, 395 U.S. 784.	53
Bell v. Hood, 327 U.S. 678.	22, 36
Bivens v. Six Unknown Named Agents Of Federal Bureau of Narcotics, 403 U.S. 388.	36
Blanchette v. Connecticut General Insurance Corporation, 419 U.S. 102.	43
Bolling v. Sharpe, 347 U.S. 491.	70
Brandenburg v. Ohio, 395 U.S. 444.	67
Burks v. United States, 437 U.S. 1.	91
Carlson v. Green, ___ U.S. ___ (Slip Opinion issued April 18, 1980).	36
Carter v. Tennessee, 18 F.2d 850	33
Colorado v. Symes, 286 U.S. 510.	21, 35 36, 68, 69

Cases: Page

Ex Parte Royall,
117 U.S. 241. . . . . 56, 63

Griffin v. Illinois,
351 U.S. 12 93

Hill v. United States,
386 U.S. 424. 75

Huffman v. Pursue Ltd.,
420 U.S. 592. 63

Jackson v. Virginia,
61 L.Ed.2d 560. 91-92

Kessler v. Department of Public Safety,
369 U.S. 153. 62

Kokaszka v. Belford,
417 U.S. 642. 38

La Buy v. Howes Leather Company,
352 U.S. 259. 78

Lewis v. United States,
___ U.S. ___ (No. 78-1595, Opinion
issued Feb. 27, 1980) 55

Marbury v. Madison,
1 Cranch 137. 59

Martenay v. United States,
216 F.2d 760. 76

Marshall v. United States,
414 U.S. 417. 70

Cases Page

Maryland v. Soper,
(No. 1) 270 U.S. 9 . . . . . 28, 76

Miller v. Commonwealth of Kentucky,
40 F.2d 820. 33

Morton v. Mancari,
417 U.S. 535 43

NAACP v. Alabama,
377 U.S. 288 66

National League of Cities v. Usery,
426 U.S. 833 . . . . . .26, 63-65

NLRB v. Catholic Bishop of Chicago,
99 S.Ct. 1313. 59

O'Donoghue v. United States,
289 U.S. 516 49

Osborne v. United States,
351 F.2d 111 92

Patterson v. New York,
432 U.S. 197 62

Peyton v. Rowe,
391 U.S. 54. 37

Philbrook v. Glodgett,
421 U.S. 707 38

Preiser v. Rodriguez,
411 U.S. 475 56

Cases — Page

Rowlette v. United States,
392 F.2d 437 79

Samuels v. Mackell,
401 U.S. 66. 62

Scarponi v. United States,
313 F.2d 950 76

State ex rel Hyder v. Superior Court,
606 P.2d 411 34

State v. Lee,
64 Conn. 265 53

State of North Carolina v. Carr,
386 F.2d 129 69

Stewart v. Kahn,
78 U.S. 493. 37

Tcherepnin v. Knight,
389 U.S. 332 37

Tennessee v. Davis,
100 U.S. 257 . . . . . passim

United States v. Anderson,
532 F.2d 1218. 92

United States v. Apfelbaum,
___ U.S. ___ (No. 78-972, Opinion issued March 5, 1980) 55

Cases Page

United States v. Beran
546 F.2d 1316, cert.denied 430
U.S. 916 . . . . . 79, 86

United States v. Carlson,
423 F.2d 431, cert.denied 400
U.S. 847 92

United States Civil Service
Commission v. The National
Association of Letter Carriers,
413 U.S. 548 59

United States v. Cohen,
445 F.Supp. 843, cert.denied
99 S.Ct. 2169. 85

United States v. Denson,
603 F.2d 1143. . . . . 28, 76

United States v. Forrest,
434 F.Supp. 1131 86

United States v. Gibbons,
437 F.Supp. 650. 86

United States v. Granger,
504 F.2d 585 92

United States v. Hamilton,
559 F.2d 1370. 92

United States v. Helstostki,
61 L.Ed.2d 12. 40

United States v. Homer,
411 F.Supp. 972, cert.denied
431 U.S. 954 79

Cases	Page
United States v. Johnson, 487 F.2d 1316	79
United States v. Kane, 319 F.Supp. 527	79
United States v. Kimbell Foods, Inc., 440 U.S. 715	43
United States v. Laurelli, 187 F.Supp. 30	80
United States v. Rivers, 406 F.Supp. 709	85
United States v. Rosenson, 291 F.Supp. 867	76
United States v. Sanges, 144 U.S. 310	24, 25, 51, 54-55
United States v. Sisson, 399 U.S. 267	23, 38 48, 52
United States v. Smith, 331 U.S. 469	30, 77 86, 87, 88, 93
United States v. Vuitch, 402 U.S. 62	59
United States v. Wade, 467 F.2d 1226, cert.denied, 410 U.S. 933	92

Cases Page

United States v. Weinstein,
452 F.2d 704. 77

United States v. Wilson,
420 U.S. 332. . . . . .23, 39, 52

United States v. Wunderlich,
342 U.S. 98 (dissenting opinion
of Justice Douglas) . 50

Will v. United States,
389 U.S. 90 . . . . . 29, 74
75, 78

Willingham v. Morgan,
395 U.S. 402. . . . . 58, 65,
67, 68

Younger v. Harris,
401 U.S. 37 . . . . . 62, 63

UNITED STATES CONSTITUTION, STATUTES AND RULES:

Supremacy Clause. 65

Double Jeopardy Clause. 15, 17

First Amendment 67

Fifth Amendment 27, 60, 70

Tenth Amendment . . . . . passim

STATUTES AND RULES (continued) Page

18 U.S.C. 3731. . . . . passim

28 U.S.C. 1291. . . . . passim

28 U.S.C. 1442(A)(1). . . . . passim

28 U.S.C. 1254(4)(1). 2, 57

28 U.S.C. 1257. 57

28 U.S.C. 1651. . . . . .5, 27, 36, 73, 75

28 U.S.C. 2241. . . . . 30, 92

28 U.S.C. 2254. 56

Rules of Criminal Procedure:

Rule 29(A). 89

Rule 29(C). . . . . passim

Rule 33 . . . . . 13, 30, 77, 80

Rule 34 . . . . . 13, 14, 30, 80

Rule 38 90

Rule 54(B)(1) 21, 33, 36, 42

RULES (continued) Page

Advisory Committee Note To
Rule 54(B)(1). 33

ARIZONA CONSTITUTION STATUTES AND RULES

Arizona Constitution, Article 6,
§ 5, as amended. 34

Arizona Constitution, Article 6,
§ 12, as amended 50

Arizona Constitution, Article 6,
§ 27 50

Arizona Constitution, Article 6,
§ 38 50

Arizona Constitution, Article 8,
part 1, § 1. 49

Arizona Constitution, Article 8,
Part 2, § 1. 50

Arizona Revised Statutes:

§13-249(A) and (B) (Criminal Code
in effect prior to October 1, 1978) 13

Rule 3 of the Rules of Procedure
For Special Actions. 6, 34

Rule 10.2, Arizona Rules of
Criminal Procedure 50

MISCELLANEOUS Page

Act For The Impartial Administration of Justice, 14 Geo. III, Ch. 39 . .44, 95-96

Criminal Appeals Act of 1907. . . . 23, 41, 52

Declaration of Independence 24, 44

Criminal Appellate Procedure - Conflict of Laws - State Right To Appeal In Criminal Case Removed To Federal Court, B.Y.U.L. Rev. 1979, p. 1006 53

Note, Limited Right of Appeal For The State, 14 Hous.L.Rev. 735 (1977) 54

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MISCELLANEOUS (continued) Page

Bible:

Deuteronomy 17 § 8-13 72

Exodus 12 § 49. 72

Numbers 15 § 15-16. 72

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-621

STATE OF ARIZONA, PETITIONER

v.

WILLIAM DALE MANYPENNY

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
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BRIEF FOR THE STATE OF ARIZONA

OPINIONS BELOW

The majority and dissenting opinions of the Court of Appeals (Pet.App. 3a-38a) are reported at 608 F.2d 1197. The decision of the District Court (*Pet.App. 41a-57a) is reported at 445 F.Supp. 1123.

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*Pet.App. refers to the appendix in the Petition for Certiorari.

JURISDICTION

The judgment of the Court of Appeals (Pet.App. 1a-2a) was entered on July 9, 1979. A Petition For Rehearing And Suggestion For Rehearing En Banc was denied on September 10, 1979 (Pet.App. 60a-61a). The time for filing the Petition For A Writ Of Certiorari was extended ten days until October 20, 1979 by order of Justice Rehnquist on October 2, 1979. The Petition For A Writ Of Certiorari was filed on October 13, 1979. On January 7, 1980, this Court invited the Solicitor General to file a brief expressing the views of the United States. In March, 1980, the Solicitor General filed its brief. The Petition For A Writ Of Certiorari was granted on April 14, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

I. Whether a state is stripped of all appellate rights when a state criminal prosecution is removed to Federal Court pursuant to 28 U.S.C. 1442(a)(1).

II. Whether a Federal District Court has jurisdiction to enter a judgment of acquittal on its own motion eleven months after the jury has returned a guilty verdict, and beyond the seven-day period provided for in Federal Rule of Criminal Procedure 29(c).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Tenth Amendment to the United States Constitution provides:

> "The powers not delegated to the United States by the Constitution, nor prohibited

by it to the states, are reserved to the states respectively, or to the people."

18 U.S.C. 3731 provides in part:

> "In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.
>
> * * *
>
> The provisions of this section shall be liberally construed to effectuate its purposes."

28 U.S.C. 1291 provides:

> "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court."

28 U.S.C. 1442(a)(1) provides:

> "(a) A civil action or criminal prosecution commenced in a State

court against any of the following persons may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:

(1) Any officer of the United States or any agency thereof, or person acting under him, for any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue."

28 U.S.C. 1651 provides in relevant part:

"1651. Writs.

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

Federal Rule of Criminal Procedure 29(c) provides:

"(c) Motion after Discharge of Jury. If the jury returns a verdict of guilty or is discharged without having returned a verdict, a motion for judgment of acquittal may be made or

renewed within 7 days after the jury is discharged or within such further time as the court may fix during the 7-day period. If a verdict of guilty is returned the court may on such motion set aside the verdict and enter judgment of acquittal. It shall not be necessary to the making of such a motion that a similar motion has been made prior to the submission of the case to the jury."

Rule 3 of the Rules of Procedure For Special Actions (Volume 17a of Arizona Revised Statutes) reads:

"Rule 3. Questions Raised

The only questions that may be raised in a special action are:
(a) Whether the defendant has failed to exercise discretion which he has a duty to exercise; or to perform a duty required by law as to which he has no discretion; or
(b) Whether the defendant has proceeded or is threatening to proceed without or in excess of jurisdiction or legal authority; or
(c) Whether a determination was arbitrary and capricious or an abuse of discretion."

STATEMENT

1. On March 15, 1976 at 9:00 p.m. Respondent MANYPENNY was on duty as a United States Border Patrol agent (Tr.* 146, 155, 281). Respondent MANYPENNY, along with Border Patrol Agent Hjelle, were suppose to stop and take into custody undocumented aliens entering the United States through a well-known undocumented alien route, Sweetwater Pass, located within Pima County, Arizona (Tr. 44, 243). Neither agent was in uniform (Tr. 16, 249). Three Mexican males were heading north on foot, seeking work. They had nothing with them but food and clothing (Tr. 15, 23, 294). One of the three aliens, victim Elfego Mendoza, when confronted by Agent Hjelle, turned and ran south along the path back towards

---

*Tr. refers to reporter's transcript of Respondent's trial.

the Mexican border (Tr. 273, 284). When victim Mendoza was approximately 150 feet south and below where Respondent MANYPENNY was positioned, (Tr. 259) Respondent MANYPENNY fired his pump action twelve-gauge shotgun three separate times (Tr. 61, 170, 176, 178). Three twelve-gauge shotgun shells were found within eight inches of one another (Tr. 62).

Two of the three shotgun shells contained birdshot, the third shell contained double ought buckshot (Tr. 66). At least one of the two shells containing birdshot hit the victim in the buttocks, causing multiple wounds (Tr. 105-106). One of the pellets from the double ought buckshot shell hit the victim in the back of his neck, (Tr. 55) severing his spinal cord (Tr. 59), turning him into a quadra-plegic (Tr. 85, 86). The moon was almost

full at that time and Respondent MANYPENNY could see the victim (Tr. 153, 254-5, 272).

Border Partol Agent Hjelle and the two other aliens approached the victim to see what the shots were about. Respondent refused their request to shine a light on the victim. Respondent assured them that the victim had not been shot, but had slipped and fallen (Tr. 22). Respondent took the victim to the hospital and told the attending physician he had found the victim in that condition. After x-rays revealed the true cause of the victim's condition, Pima County Deputy Sheriff Keele went to the hospital to investigate that same night. Respondent told Keele, in the presence of the doctor, that he had found the victim in that condition and surmised that the victim must have slipped and fallen (Tr. 35-39). Deputy Keele was

a good friend of the Respondent, and after they walked out of the hospital, Deputy Keele again asked Respondent what had occurred. Respondent repeated his story that he had found the victim in that condition (Tr. 39,41). Respondent then suggested to Deputy Keele that the two other aliens, who were potential witnesses against him, be deported. Deputy Keele rejected this suggestion (Tr. 40-41). Keele requested Respondent accompany him to his office, where Respondent at first stuck with his original story of finding the victim already injured. After further conversation, Respondent admitted to firing one shot at a rock, and guessed that one of the double ought buckshot hit the victim as a result of a ricochet. Respondent was specifically questioned by Deputy Keele on this point, and insisted he only shot once

(Tr 42). This conversation was prior to any crime scene investigation (Tr. 43).

Two weeks later, Respondent MANYPENNY, with his attorney present, had a conversation with two Pima County, Arizona prosecutors, concerning the events surrounding the shooting. At this time Respondent MANYPENNY gave three different versions of what had occurred (Tr. 112-120).

At trial, Respondent took the stand and testified that he fired the first shot into the air as a warning shot (Tr. 170); the second shot went off because the gun misfired while he was reloading (Tr. 176); the third shot also went off by accident according to Respondent (Tr. 178). Respondent testified that the three shots discharged while he was in three different places along the trail in pursuit of the victim (Tr. 175-177, 257-259). Respondent testified that "I did not intentionally point and fire that shotgun at

anyone that night" (Tr. 241). Respondent had "no idea" as to why all three shells were found within eight inches of one another in a location different from where Respondent claimed the various shots went off (Tr. 268). Respondent MANYPENNY testified that he knew it was only a misdemeanor to enter the United States illegally (Tr. 123); and that he knew he was not allowed to shoot a misdemeanor offender (Tr. 274, 311). Respondent admitted that the general procedure he and other Border Patrolmen follow when an alien eludes capture and runs south toward Mexico, is to let the alien go. Respondent further testified that "we never attempt to use force taking anybody into custody" (Tr. 273-274).

2. Respondent MANYPENNY was charged by the State of Arizona with Assault With

A Deadly Weapon in violation of A.R.S. § 13-249(A) and (B). On Respondent MANYPENNY'S motion (filed July 20, 1976), the case was removed to Federal Court for trial pursuant to 28 U.S.C. § 1442(a)(1). After a trial held on November 4 and 5, 1976, the jury returned a verdict of guilty as charged on November 6, 1976. Respondent MANYPENNY then timely moved for arrest of judgment, or in the alternative, for a new trial pursuant to Federal Rules of Criminal Procedure 33 and 34. The Federal District Court granted the Respondent's Motion For Arrest Of Judgment on November 30, 1976, 24 days after the verdict. The Petitioner then moved for reconsideration of this ruling. The Federal District Court granted the Petitioner's motion for reconsideration of its ruling on December 6, 1976, but took no further action for almost one year. On

September 8, 1977, Respondent MANYPENNY moved for a hearing to determine the status of the Petitioner's pending motion. This hearing was held on September 26, 1977. Two days later, the District Court reversed its previous order arresting judgment. The District Court, sua sponte, decided to construe Respondent MANYPENNY'S Rule 34 Motion For Arrest Of Judgment as a Rule 29(c) Motion For Judgment Of Acquittal, despite the fact that Respondent MANYPENNY had never filed a Rule 29(c) motion. The District Court then granted its own Motion For Judgment Of Acquittal, and held Respondent MANYPENNY not guilty. Arizona v. Manypenny, 445 F.Supp. 1123 (D. Ariz. 1977) (Pet.App. at 41a-57a).

3. The Petitioner filed a timely Notice Of Appeal pursuant to 18 U.S.C. 3731. The Court of Appeals for the Ninth Circuit

originally issued a per curiam opinion on July 31, 1978, dismissing the Petitioner's appeal on double jeopardy grounds (Pet. App. 39a-40a).

The Petitioner then filed a timely Petition For Rehearing And Suggestion For Rehearing En Banc.

4. On July 9, 1979, the Court of Appeals granted the Petitioner's Petition For Rehearing, withdrew its prior opinion and substituted the instant majority and dissenting opinions (Pet.App. 1a-38a). The majority, per Judge Choy, acknowledged that:

> "We share the concerns expressed by Judge Kennedy in his dissent that the policy of § 3731, which is designed to 'prevent erroneous trial court rulings from thwarting lawful prosecutions,' is equally applicable to state prosecutions and federal prosecutions, and that not allowing state appeals in cases removed to the federal courts under § 1442(a)(1) has a substantial effect on the

> delicate balance of our federal system." (Pet.App. at 8a)

Nonetheless, the majority concluded that:

> ". . . only Congress can authorize an appeal by a state in a § 1442(a)(1) criminal prosecution. Thus far, Congress has not seen fit to do so. Therefore, we hold that we are without jurisdiction to entertain this appeal.
>
> APPEAL DISMISSED." (Pet.App. at 11a.)

The majority did not reach or discuss the merits of the Petitioner's appeal.

Judge Kennedy, in his dissent found that:

> "There are two possible sources of jurisdiction, 18 U.S.C. § 3731 and 28 U.S.C. § 1291." (Pet.App. at 15a.)

Judge Kennedy's dissent first examined the jurisdictional issue at length and found that both 18 U.S.C. 3731 and 28 U.S.C. 1291 could serve as a jurisdictional basis for the Petitioner's appeal (Pet.App. 15a-23a).

Judge Kennedy then considered possible double jeopardy problems posed by the Petitioner's appeal and concluded there was no double jeopardy barrier to this appeal (Pet.App. 24a-30a). Turning to the merits of the District Court's ruling, Judge Kennedy rejected the Petitioner's contention that the District Court was without jurisdiction to sua sponte enter a Judgment Of Acquittal eleven months after the jury returned a guilty verdict. Judge Kennedy's dissent noted that:

> "At least two circuits have held that unless a timely motion is filed, the judge lacks jurisdiction to enter a judgment of acquittal. United States v. Johnson, 487 F.2d 1318, 1321 (5th Cir.), cert. denied, 419 U.S. 825 (1974); Rowlette v. United States, 392 F.2d 437, 439 (10th Cir. 1968). See also United States v. Homer, 411 F.Supp. 972, 975 (W.D. Pa.), aff'd on other grounds, 545 F.2d 864 (3rd Cir. 1976), cert. denied, 431 U.S. 954 (1977). The defendant did file motions for arrest of

> judgment and for a new trial within the time limits prescribed by rules 29(c) and 34. The court having retained jurisdiction over the case, I think it had discretion to consider entry of a judgment of acquittal on its own motion, where it was convinced there had been a fundamental error in its instructions, Fed. R. Crim. P. 2.
>
> I conclude further, however, that the trial court misused its discretion in granting a judgment of acquittal." (Pet.App. 30a-31a)

Judge Kennedy's dissent then discussed the merits of the Petitioner's appeal and concluded his dissent by stating:

> "I would hold that this court has jurisdiction and reverse and remand." (Pet.App. at 34a)

5. On August 13, 1979, the Court of Appeals, acting upon the Petitioner's request, issued an order amending the dissenting opinion to correct a factual error (Pet.App. 58a-59a). The opinion of the Court of Appeals (Pet.App. 1a-38a) was reproduced in the Petition For Certiorari

as amended by the Court's order of August 13, 1979.

6. The Petitioner filed a timely Petition For Rehearing And Suggestion For Rehearing En Banc, which was denied on September 10, 1979 (Pet.App. 60a-61a).

7. On October 2, 1979, Justice Rehnquist, acting on Petitioner's motion, extended the time for filing this petition a period of ten days until October 20, 1979.

8. Petitioner filed its Petition For Writ Of Certiorari on October 13, 1979.

9. On January 7, 1980, this Court entered an order inviting the Solicitor General of the United States to file a brief expressing the views of the United States.

10. In March, 1980, the Solicitor General filed an Amicus Brief for the United States. It was the opinion of the

Solicitor General that certiorari should be granted, and that the judgment of the Ninth Circuit should be reversed (Amicus Brief, p. 10). The Solicitor General was of the opinion that both 18 U.S.C. 3731 and 28 U.S.C. 1291 gave the Court of Appeals jurisdiction to consider the Petitioner's appeal. The Solicitor General did not address the second issue presented for review by Petitioner (Amicus Brief, p. 1, footnote 1).

11. On April 14, 1980, the Petition For a Writ of Certiorari was granted by this Court.

SUMMARY OF ARGUMENT

I.

The first question presented by this case is whether a State government is reduced to second class status and stripped of its right to appeal when a State criminal prosecution is removed to federal court pursuant to 28 U.S.C. 1442(A)(1).

A. In Tennessee v. Davis, 100 U.S. 257 (1880) the Court ruled that in removal prosecutions, federal courts are to apply state substantive law and federal procedural law. This Court-made rule is codified in Rule 54(B)(1) of the Federal Rules of Criminal Procedure. In Colorado v. Symes, 286 U.S. 510 (1932) this court stated that the right of the states "to make and enforce their own laws is equal to the right of the federal government" and that the removal statute

"is to be construed with highest regard for such equality." 286 U.S. at 518. Irrespective of whether the right of the government to appeal in a criminal case is deemed substantive or procedural, the Petitioner has the right to an appeal since Arizona law allows appellate review in the circumstances of the instant case.

The majority in the Ninth Circuit ruled they were without jurisdiction to consider this appeal because Congress has never explicitly authorized appeals by states in removal prosecutions. In so ruling, the majority overlooked the rule set forth in Bell v. Hood, 327 U.S. 678 (1946) that where legal rights have been invaded "Federal Courts may use any available remedy to make good the wrong done." 327 U.S. at 684.

B. 18 U.S.C. 3731 which authorizes appeals by the "United States" in criminal cases, provided the Court of Appeals with a jurisdictional basis for this appeal. 18 U.S.C. 3731 contains a provision which reads: "The provisions of this section shall be liberally construed to effectuate its purposes." The original Criminal Appeals Act was passed to prevent a single federal district judge from having the unreviewable power to defeat any criminal prosecution instituted by the government. United States v. Sisson, 399 U.S. 267, 293 (1970). In enacting the current version of 18 U.S.C. 3731, this court stated that: "Congress intended to remove all statutory barriers to government appeals and to allow appeals whenever the Constitution would permit." United States v. Wilson, 420 U.S. 332, 337 (1975).

Congress did not need to consider the application of 18 U.S.C. 3731 to removal cases since Tennessee v. Davis was the law of the land long before 18 U.S.C. 3731 or its predecessor was enacted. Congress' failure to specifically consider this issue cannot be construed as indicating an intent on the part of Congress to reduce the states to the second class status they enjoyed as colonies prior to the American Revolution. The Removal Bill passed by Great Britain in 1774 constituted one of the enumerated grievances that made up the Declaration of Independence.

C. 28 U.S.C. 1291 which provides for review of "all final decisions" of the United States District Court provides a second jurisdictional basis for this appeal.

In United States v. Sanges, 144 U.S. 310 (1890) this Court merely held that the "United States" may not appeal a ruling

in favor of a defendant until Congress passed a statute that expressly gave the United States Government the right to appeal in a criminal case. Sanges was not a removal case, and the Sanges decision never had any application to the right of state governments to appeal in criminal cases.

The rationale behind the Sanges rule was that appeals by the sovereign in criminal cases were historically disfavored. This 1892 rationale no longer exists since the Federal Government, the State of Arizona, and the overwhelming majority of the 50 states currently allow appeals by the government in criminal cases. Current congressional policy also favors allowing state governments the use of the federal appellate courts to appeal decisions in favor of state criminal defendants.

D. This Court's long standing policy that statutes should be construed so as to save

them from constitutional attack requires this Court to construe 18 U.S.C. 3731 or 28 U.S.C. 1291 as allowing for appeals by state governments in removal prosecutions.

If this Court does not construe either statute as permitting appeals by state governments in removal prosecutions, the Removal Statute will be subject to attack on Tenth Amendment grounds. National League of Cities v. Usery, 426 U.S. 833 (1976). Allowing a federal district court unreviewable powers to block any state prosecution involving a federal officer represents a serious encroachment on state sovereignty and violates many of this Court's teachings on federalism. The Majority decision makes the Removal Statute subject to attack on "overbreadth" grounds since this overly broad windfall benefit to federal officers does not further any of the purposes the Removal Statute was designed to serve.

18 U.S.C. 3731 will also be vulnerable to constitutional attack on Fifth Amendment equal protection grounds. The majority construed 18 U.S.C. 3731 as setting up two distinct classes of defendants in Federal District Court: (1) The run-of-the-mill federal defendant who is subject to a prosecution appeal challenging rulings in his favor; and (2) The removal defendant, federal officers who now constitute a special privileged class, free to enjoy the unreviewable benefits of errors committed in their favor by the District Court. There is no rational basis for such a distinction, and the equal protection rights of the non-privileged federal defendant are violated each time the Federal Government files an appeal pursuant to 18 U.S.C. 3731.

E. The Mandamus Statute 28 U.S.C. 1651 provided the Court of Appeals and provides this Court with jurisdiction to consider Petitioner's

contention that the District Court was wholly without jurisdiction to sua sponte enter a judgment of acquittal eleven months after the jury returned a guilty verdict.

In United States v. Denson, 603 F.2d 1143 (1979) the En Banc Fifth Circuit held that when "mandamus is sought from an appellate court to confine a trial court to a lawful exercise of its prescribed authority, the court should issue the writ almost as a matter of course." 603 F.2d at 1145. This Court stated in Maryland v. Soper, (No. 1) 270 U.S. 9 (1925) that: "There should a more liberal use of mandamus" in removed state criminal prosecutions. 270 U.S. at 29.

For the reasons discussed in Argument II, infra, the entry of the judgment of acquittal by the District Court was a nullity since the District Court was without jurisdiction to have entered such an order. Since the District Court "overreached its judicial power

to deny the government the rightful fruits of a valid conviction" Will v. United States, 389 U.S. 90, 97-98 (1967) the Ninth Circuit should have issued a Writ of Mandamus ordering the District Court to reinstate the guilty verdict.

II.

The second question before this Court is whether a Federal District Court has jurisdiction to sua sponte enter a judgment of acquittal beyond the 7-day time limit provided for in Federal Rule of Criminal Procedure 29(C).

The lower federal courts have consistently held that unless a motion is filed, or an extension of time is granted within the 7-day limit, the District Court loses its jurisdiction to consider such a motion. Respondent filed timely post-trial

motions seeking a new trial pursuant to Federal Rule of Criminal Procedure 33 and a timely motion in arrest of judgment pursuant to Federal Rule of Criminal Procedure 34. Neither motion attacked the sufficiency of evidence in the government's case, which is the sole ground for granting a judgment of acquittal. Therefore, neither post-trial motion could be fairly construed as a motion for judgment of acquittal.

In United States v. Smith, 331 U.S. 469 (1947) this Court held that the similar time limitation for Rule 33 Motions was jurisdictional. Petitioner submits that there is no rationale for ignoring the time limitation set forth in Rule 29(C), since the identical sufficiency of the evidence claim can be litigated on direct appeal or in a collateral attack pursuant to 28 U.S.C. 2241. When the District Court is reviewing a jury's guilty

verdict pursuant to Rule 29(C), the District Court sits as a reviewing court, not as the finder of the fact. The standard of review to be applied by the District Court and a Federal Appeals Court in this situation is identical, so a defendant suffers no legally cognizable detriment by having an appeals court pass on his sufficiency of the evidence claim.

ARGUMENT

I.

A STATE GOVERNMENT IS NOT REDUCED TO SECOND CLASS STATUS AND STRIPPED OF ITS RIGHT TO APPEAL WHEN A STATE CRIMINAL PROSECUTION IS REMOVED TO FEDERAL DISTRICT COURT

A. FEDERAL COURTS MUST APPLY THE SUBSTANTIVE LAW OF THE STATE AND FEDERAL PROCEDURE IN A REMOVAL PROSECUTION; IRRESPECTIVE OF WHETHER THE GOVERNMENT'S RIGHT TO APPEAL IS DEEMED SUBSTANTIVE OR PROCEDURAL, THE STATE OF ARIZONA HAS A RIGHT TO APPEAL IN THIS CASE

In Tennessee v. Davis, 100 U.S. 257 (1880), the State of Tennessee challenged the validity of the removal statute then in effect on the grounds, inter alia, that Congress had failed to specify any mode of procedure for the trial of removal cases. This Court acknowledged that Congress had neglected to prescribe any procedure, yet dismissed these "imaginary difficulties and incongruities" as "unreal" and held the "mode of trial is sufficiently obvious." This Court went on

to establish the rule that when state criminal prosecutions are removed to Federal Court, the Federal Court is to apply state substantive law and federal procedural law. 100 U.S. at 271-272. See also, Carter v. Tennessee, 18 F.2d 850; and Miller v. Commonwealth of Kentucky, 40 F.2d 820. The Advisory Committee Note to Federal Rule of Criminal Procedure 54(b)(1) (which governs removal proceedings) states this Rule in no uncertain terms.[1]

1/ The Advisory Committee Note to Rule 54(b)(1) reads in relevant part:

> "In such cases the Federal court applies the substantive law of the State, but follows Federal procedure; State of Tennessee v. Davis, 100 U.S. 257, 25 L.Ed. 648; Carter v. Tennessee, 18 F.2d 850, C.C.A. 6th; Miller v. Kentucky, 40 F.2d 820, C.C.A. 6th; see, also, State v. Maryland v. Soper, 46 S.Ct. 185, 270 U.S. 9, 70 L.Ed. 449. The rule is, therefore, a restatement of existing law, except that it does not affect whatever power the State prosecutor may have as to dismissal."

If this Court deems such right to be substantive,[2] then Arizona law unquestionably authorizes appellate review in this type of case.[3]

2/ Whether the right to appeal is deemed a substantive or procedural right is irrelevant to the proper resolution of this case from the standpoint of the instant Petitioner, since Arizona law provides for appellate review in the circumstances of the instant case. Therefore, Petitioner has not briefed this issue and expresses no position on it. See, Brief For The United States As Amicus Curiae (p. 9-10). If this Court is interested in resolving this issue, Judge Kennedy's dissent discusses it at length in his Footnote One (Pet.App. 35a-37a).

3/ See, State ex rel. Hyder v. Superior Court, ____ Ariz. ____, 606 P.2d 411 reproduced on pp. 4-8 of the Supplement To Petition For Writ Of Certiorari, filed March 3, 1980 and cases cited in Judge Kennedy's dissenting opinion (Pet.App. 21a-24a and 38a). See also, Rule 3 of Rules of Procedure for Special Actions, Volume 17A of Arizona Revised Statutes, reproduced at p. ____ supra) and Article VI, Section 5 of the Arizona Constitution, as amended, Volume I of Arizona Revised Statutes.

If this Court deems such right to be procedural, then Tennessee v. Davis and its progeny mandate that in a removal prosecution the state government has all the procedural rights of the United States Government, including the same right to appeal pursuant to 18 U.S.C. 3731. See, Colorado v. Symes, 286 U.S. 510 at 518 (1932) quoted in Argument D, infra, pg. 69.

The majority in the Ninth Circuit ruled that they were without jurisdiction to entertain this appeal because Congress has never explicitly authorized such an appeal (Pet.App. 11a). In so ruling, they not only ignored the rule set out in Tennessee v. Davis, supra, but also ignored the well settled rule that "where legal rights have been invaded and a federal statute provides for a general right to

sue for such invasion, Federal Courts may use any available remedy to make good the wrong done." Bell v. Hood, 327 U.S. 678 (1946) at 684. See also, Bivens v. Six Unknown Named Agents Of Federal Bureau Of Narcotics, 403 U.S. 388 (1971) at 392; and Carlson v. Green, ____ U.S. ____ (1980). Petitioner's Tenth Amendment Rights have been invaded here, (discussed in part D infra) and this Court may imply a remedy under the Constitution as it did in Bivens and Carlson.

Three federal statutes give the Ninth Circuit jurisdiction to hear the instant appeal: 18 U.S.C. 3731; 28 U.S.C. 1291; and 28 U.S.C. 1651. Petitioner submits that even if Tennessee v. Davis, Colorado v. Symes, and Rule 54(b)(1) did not exist, any one of these statutes standing alone is sufficient to authorize this appeal. (discussed infra).

B. CONGRESS DID NOT INTEND TO PRECLUDE APPEALS BY STATE GOVERNMENTS IN REMOVAL CASES WHEN IT ENACTED 18 U.S.C. 3731

The majority's ruling, that the use of the term "United States" in 18 U.S.C. 3731 precludes use of this statute as a jurisdictional basis for the instant appeal, ignores the very language of 18 U.S.C. 3731 itself that states: "(E) The provisions of this section shall be liberally construed to effectuate its purposes."

This Court has repeatedly held that a remedial statute should be construed broadly to effectuate its purposes. Tcherepnin v. Knight, 389 U.S. 332 at 336 (1967); Peyton v. Rowe, 391 U.S. 54 at 65 (1968).

This Court stated long ago in Stewart v. Kahn, 78 U.S. 493 (1870) that:

> "A case may be within the meaning of a statute and not within its letter, and within its letter and not within its meaning. The intention of the law-maker con-

> stitutes the law. The statute is a remedial one and should be construed liberally to carry out the wise and salutary purposes of its enactment." 78 U.S. at 504.

The principles set forth in Stewart v. Kahn have not been eroded in the intervening years. Kokaszka v. Belford, 417 U.S. 642 at 650 (1974); Philbrook v. Glodgett, 421 U.S. 707 at 713-714 (1975).

This Court has already interpreted the legislative intent behind both 18 U.S.C. 3731 and its predecessor. In United States v. Sisson, 399 U.S. 267 (1970), this Court discussed the concerns of Congress that led to the enactment of the predecessor of the current version of 18 U.S.C. 3731. This Court stated:

> "Their primary purpose was perhaps best expressed by Attorney General Miller in his 1892 report: 'As the law now stands . . . it is in the power of a single district judge, by quashing an indictment, to defeat any criminal prosecution instituted by the Government.'" 399 U.S. at 293. (Emphasis added.)

In construing the current version of 18 U.S.C. 3731, this Court stated in United States v. Wilson, 420 U.S. 332 (1975):

> "While the language of the new Act is not dispositive, the legislative history makes it clear that Congress intended to remove all statutory barriers to Government appeals and to allow appeals whenever the Constitution would permit." 420 U.S. at 337. (Emphasis added)[4]

4/ The majority opinion per Justice Marshall refers to the prosecution as the "Government" thirty-nine times in his majority opinion, and only uses the term "United States" one time, (420 U.S. at 338) to refer to the prosecution. The dissent uses the term "Government" six times and never uses the term "United States" except in citing the names of previous cases. Petitioner submits that this Court, perhaps more than any other institution in the entire world, is aware of the importance of the careful and precise use of language. If this Court used the words "United States" and "Government" interchangeably, then in the complete absence of anything in the Congressional record to suggest that Congress intended to restrict the rights of states to appeal in removal prosecutions, it is tenuous at best to read the term "United States" as manifesting an intent on the

Accord, see, United States v. Helstostki, 61 L.Ed.2d 12 (1979) footnote 6 found at 61 L.Ed.2d at 22. As the Solicitor General pointed out in his Amicus Brief:

> "Congress gave no specific consideration to the right of appeal of a state prosecuting in federal court, although the frequent references in the legislative history to 'Government' appeals suggest that Congress would have treated the states just as the United States, if Congress had felt that state appeals would be barred unless authorized in Section 3731. See, e.g., S.Rep. No. 1296, 91st Cong., 2d Sess. 2 (1970)." Amicus Brief p. 8-9.

Indeed, even the majority in the Ninth Circuit conceded that their decision frustrated the clear Congressional intent behind 18 U.S.C. 3731: "We share the

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part of Congress to preclude a state from exercising the substantive or procedural right to appeal provided for in Tennessee v. Davis. This is especially true in light of the "liberally construed to effectuate its purposes" language found in the statute itself.

concerns expressed by Judge Kennedy in his dissent that the policy of § 3731, which is designed to 'prevent erroneous trial court rulings from thwarting lawful proseuctions,' is equally applicable to state prosecutions and federal prosecutions. . ." (Pet. App. 8a).

That Congress did not specifically consider the application of 18 U.S.C. 3731 to the states is not surprising in light of the relative rarity of removal prosecutions and the fact that Tennessee v. Davis was the law of the land long before 18 U.S.C. 3731 or its predecessor was enacted into law.[5] Congress could not have anticipated

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5/ Tennessee v. Davis was decided in 1880; the predecessor to the current version of 18 U.S.C. 3731, The Criminal Appeals Act Of 1907, was as its title indicates, passed in 1907. See United States v. Sisson, supra, 399 U.S. at 293-296.

that the Ninth Circuit would misinterpret Tennessee v. Davis and Rule 54(b)(1) in its ruling on this issue in 1979, when Congress amended 18 U.S.C. 3731 in 1971. Petitioner submits that this issue was settled back in 1880, and the failure of Congress to specifically address an issue in 1971 that did not need addressing, cannot fairly be interpreted as meaning that Congress intended to deny a state the right to appeal in a removal prosecution.

Moreover, even if this Court is of the view that this issue is not controlled by Tennessee v. Davis, and was in fact left open by Congressional oversight, this Court has held that in fashioning federal principles to govern areas left open by Congress, the function of this Court is to effectuate Congressional policy. United States v.

Kimbell Foods Inc., 440 U.S. 715 at 727 (1979). This Court has also stated that when a statute is ambiguous, construction should go in the direction of constitutional policy. Blanchette v. Connecticut General Insurance Corporation, 419 U.S. 102 at 134 (1974). For the reasons discussed in part D infra, constitutional policy favors allowing this appeal. Respondent may argue in his brief, in an attempt to avoid the plain import of Tennessee v. Davis, that when Congress passed 18 U.S.C. 3731, its use of the term "United States" represented a repeal by implication of the Court made rule in Tennessee v. Davis. Such argument is not well taken. It is a cardinal rule of statutory construction that repeals by implication are not favored. Morton v. Mancari, 417 U.S. 535 at 545-550 (1974). As already noted, there is nothing

that indicates that Congress intended this result.

Furthermore, Petitioner submits that in seeking to determine Congressional intent, American history should be taken into consideration.

An enumerated grievance listed in the Declaration of Independence as being one of the "repeated injuries and usurpations, all have in direct object the establishment of absolute Tyranny over these states" was: "For protecting them, by a mock Trial, from punishment for any Murders which they should commit on the Inhabitants of these States." This was a reference to the law known as the "Act for the Impartial Administration of Justice" which passed Parliament on May 26, 1774 (14 Geo. III C. 39). This Act was in fact a "removal statute" which passed Parliament as part of British retaliation for the Boston Tea Party. This

Bill, called the "Murder Bill" in America, was among the most decried of the so-called "Intolerable Acts". When the Bill was first introduced to Parliment by Lord North, Colonel Issac Barre, the member of Parliament whose impassioned speech against the Stamp Act had provided the American radicals with the name "Sons of Liberty" charged that Lord North was proposing nothing more than a license for the army to kill Americans.[6]

6/ Authority - N. Stout, The Perfect Crisis, The Beginning Of The Revolutionary War, New York University Press, New York, 1976, p. 22-48

Friedenwald, in his work, The Declaration of Independence, An Interpretation And An Analysis, DA CAPO Press, New York, 1974, wrote in regard to this provision of the Declaration:

> "This was one of the acts repeatedly decried in the state papers of the earlier Congress, and moved Jefferson to denounce those who would submit to the enforcement of its provisions as 'cowards who would suffer a countryman to be torn

In the instant case, the same United States District Court that has so far suc-

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> from the bowels of their society, in order to be thus offered a sacrifice to parliamentary tyranny,' meriting 'that everlasting infamy now fixed on the authors of the act!' The act had been passed to provide for such contingencies as had arisen after the 'Boston Massacre' --the trial of persons accused of murder while in the discharge of their official duties. By its terms those in His Majesty's service, military as well as civil, accused of murder committed while executing the laws of the realm in Massachusetts, might obtain a change of venue to some other province, or to Great Britian, 'if it shall appear, to the satisfaction of the . . . governor, . . . that an indifferent trial cannot be had within the said province.' Provision was made also for the transportation of witnesses as well, and most grievous of all, the accused might be admitted to bail upon the order of the governor, it mattered not how flagrant the crime charged against him. As there was little likelihood that a British official, military or civil, would be brought to trial in England for committing the crime of executing

cessfully blocked this prosecution and kept Respondent MANYPENNY from as yet spending a single day in jail, expressed on the record his concern that this state prosecution might hurt morale among federal law enforcement agents.[7] The instant case represents a reversion to the state of affairs the Founding Fathers thought they had eliminated after they won the Revolutionary War and enacted the Tenth Amendment.[8]

> the law in America, this was regarded as a unwarrantable invasion of colonial rights."

The history surrounding the "Murder Bill" is discussed at length on pages 95-96, infra.

7/ See transcript of August 30, 1976 page 9 reproduced in Petition For Cert., footnote 5 at pages 42-43.

8/ The United States Government apparently has failed to take effective measures to

The instant case is also a classic example of what this Court said Congress was concerned with when it passed the predecessor to 18 U.S.C. 3731. See United States v. Sisson, supra.

In the absence of any evidence, this Court should not assume that the elected representatives of the people who make up the Congress intended to reduce the very states they represented to the status of the colonies on the eve of the American Revolution, by allowing unelected[9] federal judges to have the unreviewable power to defeat any state prosecution involving a federal officer.

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contol violence by members of its Border Patrol, which is a division of the United States Department of Justice. See "Violence, Often Unchecked, Pervades U.S. Border Patrol." New York Times, January 14, 1980.

9/ Indeed, another serious bone of contention between the colonists and England

C. 28 U.S.C. 1291 PROVIDES FOR REVIEW OF "ALL FINAL DECISIONS OF THE DISTRICT COURTS OF THE UNITED STATES . . ."; IT PROVIDES A SECOND JURISDICTIONAL BASIS FOR THIS APPEAL

Assuming arguendo that this Court agrees with the majority's literal interpretation of 18 U.S.C. 3731, then this

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was that Colonial judges were no longer subject to influence or control by the Colonists since "He has made Judges dependent on his Will alone, for the tenure of their offices and the amount and payment of their salaries." Declaration of Independence, supra. The Founding Fathers sought to eliminate the danger of the judiciary being unduly influenced by the other branches of government by providing in Article III, Section I of our Constitution that federal judges shall serve for life and cannot have their salaries reduced during their tenure in office. See, O'Donoghue v. United States, 289 U.S. 516 at 531. 28 U.S.C. 1291 and 18 U.S.C. 3731 are unequivocal expressions of Congressional intent that the independence granted the federal judiciary is not a grant of independence to any one judge to be a power unto himself, answerable to no one and free to ignore both the law and his own lack of jurisdiction.

In Arizona by contrast, judges are subject to recall by voters (Arizona Constitution, Article VIII, Part 1, Section 1);

Court should also read 28 U.S.C. 1291 literally. 28 U.S.C. 1291 reads in relevant part:

> "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States. . ."

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they may also be removed by impeachment (Arizona Constitution, Article VIII, Part 2, Section 1). Judges have to face the electorate every four years (Article VI, Section 12 of the Arizona Constitution, as amended) when the electorate votes as to whether the judge shall remain in office (Article VI, Section 38, as amended of the Arizona Constitution). Judges may not comment on the evidence at a trial in Arizona (Article VI, Section 27, as amended of the Arizona Constitution). Moreover, the prosecution as well as the defense may preclude a judge from hearing a case simply by filing an affidavit; no cause need be given (Arizona Rule of Criminal Procedure 10.2 found in Volume 17, Arizona Revised Statutes). All the foregoing serve, along with full appellate review, to restrain a judge from granting a judgment of acquittal in Arizona where the evidence does not justify it. None of the foregoing "political" restraints exist in the Federal system. Therefore, Petitioner submits that even if Arizona law did not provide for appellate review in these circumstances, Arizona and any other state government in a removal prosecution should be accorded the same right to appeal that Congress felt the United States Government needed.

Judge Kennedy's dissent (Pet.App. 18a-22a) found that 28 U.S.C. 1291 provided an alternative jurisdictional basis for the Court of Appeals to hear the state's appeal. The majority in the Court of Appeals held this language inapplicable to this case, stating: "A statute expressly giving the state a right to appeal in a criminal case is required." (Pet.App. 13a, footnote 3) (Emphasis in original)

The majority based its decision on United States v. Sanges, 144 U.S. 310 (1892). The Sanges Court, after surveying the law in various jurisdictions in the United States and at Common Law, concluded that since appeals in criminal cases by the government were historically disfavored, this Court would not permit the "United States" to appeal an order in favor of a defendant until such appeal was expressly authorized by Congress:

> "In none of the provisions of this act, defining the appellate jurisdiction, either of this court, or of the Circuit Court of Appeals, is there any indication of an intention to confer upon the United States the right to bring up a criminal case of any grade after judgment below in favor of the defendant. It is impossible to presume an intention on the part of Congress to make so serious and far-reaching an innovation in the criminal jurisprudence of the United States." 144 U.S. at 323 (Emphasis added)

Congressional efforts to pass such a statute began immediately after the Sanges decision was promulgated, culminating in the passage of The Criminal Appeals Act Of 1907. See, United States v. Sisson, supra, 399 U.S. at 293-6. And, as noted in United States v. Wilson, supra, the current version of 18 U.S.C. 3731 allows appeals by the government whenever the Constitution will permit them.

The Sanges Rule applied only to prosecutions by the United States Government.[10]

Allowing a state government the right to appeal in a removal prosecution would be neither a "serious" nor a "far-reaching innovation in the criminal jurisprudence of the United States". It would be completely consistent with contemporary jurisprudence in the Federal Court system, Arizona's Court system, and the courts of the overwhelming

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10/ Each state has been free to adopt or reject this rule. It is not clear whether all states even adopted the rule. See, State v. Lee, 64 Conn. 265, 30, A. 1110 (1894). Indeed, it was not until 1969 in Benton v. Maryland, 395 U.S. 784, that the Court even held that the Fifth Amendment's double jeopardy prohibition applied to the states through the Fourteenth Amendment. See, Criminal Appellate Procedure - Conflict of Laws - State Right to Appeal in Criminal Case Removed to Federal Court, B.Y.U.L. Rev. 1979, p. 1006, footnote 33 at 1011. The above cited law review article discusses the instant case and is highly critical of the majority opinion.

majority of the 50 states.[11] Petitioner submits that the majority decision, which relegates a state government to the status of a mendicant in a removal prosecution, is in fact a serious and far-reaching innovation which should not be presumed absent an express declaration of Congressional intent.

Moreover, in Sanges, the United States was seeking to invoke the court's jurisdiction under:

11/ Today only Texas, Georgia, and Nevada have no right of appeal in criminal cases from an adverse judgment; conversely, three states, Connecticut, Vermont, and Wisconsin, have a right of appeal equal to defendant's. Between these extremes are jurisdictions which recognize by statute the State's right of appeal from pretrial motions and on questions of law.

Note, Limited Right of Appeal for the State, 14 Hous.L.Rev. 735, 737 (1977).

> ". . .that provision of the Judiciary Act of 1891, by which 'appeals or writs of error may be taken from the District Courts or from the existing Circuit Courts direct to the Supreme Court' 'in any case that involves the construction or application of the Constitution of the United States.' Act of March 3, 1891, c. 517, § 5; 26 Stat. 827, 838." 144 U.S. at

By contrast the language of 28 U.S.C. 1291 "all final decisions" is non-technical and far broader.

> "It is a well-established principle of statutory construction that absent clear evidence of a contrary legislative intention, a statute should be interpreted according to its plain language." United States v. Apfelbaum, No. 78-972, Opinion issued March 5, 1980. See also, Lewis v. United States, No. 78-1595, Opinion issued February 27, 1980.

Nothing in the legislative history indicates any intention on the part of Congress to forbid a state from using the unequivocal language of 28 U.S.C. 1291 to exercise its right of appeal in a removed criminal prosecution.[12]

12/ The Solicitor General pointed out in his Amicus Brief (footnote 6 on p. 5) that states have regularly been using the broad language of 28 U.S.C. 1291 as the jurisdictional basis for obtaining review in the Federal Court of Appeals from adverse decisions by Federal District Courts in cases arising under 28 U.S.C. 2254. 28 U.S.C. 2254 provides for Habeas Corpus relief for persons in state custody "only on the grounds that he is in custody in violation of the constitution or laws or treaties of the United States." A state prisoner may not even seek such relief until he or she has exhausted all remedies open to them under state law. This doctrine was first announced in Ex Parte Royall, 117 U.S. 241 (1886) and codified in 1948 in 28 U.S.C. 2254 (c). It was explained by this Court in Preiser v. Rodriguez, 411 U.S. 475 (1973):

> "The rule of exhaustion in federal habeaus corpus actions is rooted in considerations of federal-state comity. That principle was defined in Younger v. Harris, 401 U.S. 37, 44 27 L.Ed.2d 669, 91 S.Ct.

Congressional policy is not adverse to allowing state governments the right to appeal decisions favorable to criminal defendants in Federal Courts. State governments are authorized by statute to petition this Court for review of decisions in favor of state criminal defendants by the highest court of their own state (28 U.S.C. 1257); and may petition this Court for review where a Federal Appeals Court has rendered a decision in favor of a state criminal defendant (28 U.S.C. 1254 (1)).

Petitioner is in full agreement with the Solicitor General when he stated:

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746 (1971), as 'a proper respect for state functions,'. . ." 411 U.S. at 491.

Why the Sanges Rule is offended by an appeal in this case pursuant to 28 U.S.C. 1291, where Respondent has yet to spend one day in jail, but is not offended by a state government appeal from a Federal District Court ruling in favor of a defendant who has already spent years in prison while exhausting his remedies in state court, is not discussed by the majority.

> "If the meaning of 'United States' in Sanges is stretched to include individual states, however, then 'United States' in Section 3731 should be given the same construction, and Section 3731 should be held to authorize the appeal here." (Amicus Brief, p. 9, supra)

In a similar vein, in Willingham v. Morgan, 395 U.S. 402 (1969), this Court stated:

> ". . . Congress has decided that federal officers, and indeed the Federal Government itself, require the protection of a federal forum. This policy should not be frustrated by a narrow, grudging interpretation of § 1442(a)(1)." 395 U.S. at 407.

Petitioner submits the Congressional policy behind 18 U.S.C. 3731 and 28 U.S.C. 1291 should not be frustrated by a narrow grudging interpretation of its operation within the removal context.

D. FEDERALISM CONSIDERATIONS AND THE TENTH AMENDMENT IMPELS THIS COURT TO CONSTRUE 18 U.S.C. 3731 OR 28 U.S.C. 1291 AS ALLOWING THE STATE THE RIGHT TO APPEAL; OTHERWISE 28 U.S.C. 1442(a)(1) AND 18 U.S.C. 3731 ARE VULNERABLE TO CONSTITUTIONAL ATTACK

In Marbury v. Madison, 1 Cranch 137 (1803), this Court ruled that ". . . a law repugnant to the Constitution is void."

In N.L.R.B. v. Catholic Bishop of Chicago, 99 S.Ct. 1313 (1979), Chief Justice Burger wrote:

> "In a number of cases the Court has heeded the essence of Chief Justice Marshall's admonition in The Charming Betsy, 2 Cranch (6 U.S.) 64, 118, 2 L.Ed. 208 (1804), by holding that an Act of Congress ought not be construed to violate the Constitution if any other possible construction remains available." 99 S.Ct. at 1318.

See also, United States Civil Service Commission v. National Association of Letter Carriers, 413 U.S. 548 at 571 (1973); and United States v. Vuitch, 402 U.S. 62, 70 (1971).

Petitioner contends that if the removal statute is allowed to operate in a manner that gives Federal District Judges unreviewable discretion[13] to block any state criminal prosecution involving federal officers, then the removal statute is unconstitutional as repugnant to the Tenth Amendment and Federalism. As will be discussed infra, the constitutionality of 18 U.S.C. 3731 would also be subject to constitutional attack on Fifth Amendment Equal Protection grounds if the majority

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13/ "Absolute discretion is a ruthless master. It is more destructive of freedom than any of man's other inventions." Douglas, J. dissenting in United States v. Wunderlich, 342 U.S. 98, 101 (1951).

opinion's construction of 18 U.S.C. 3731 is not reversed.[14]

The Tenth Amendment reads in its entirety:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."

14/ This Court has stated:

> "'[a]lthough this Court will often strain to construe legislation so as to save it against constitutional attack, it must not and will not carry this to the point of perverting the purpose of a statute . . .' or judicially rewriting it. Scales v. United States, supra, 367 U.S. at 211." Quoted in Aptheker v. Secretary of State, 378 U.S. 500 at 515 (1964).

For the reasons already set forth in Arguments B and C, supra, one could hardly characterize the construction of 18 U.S.C. 3731 or 28 U.S.C. 1291 as providing for appellate review in the instant case, as "perverting the purpose of a statute."

In Kessler v. Department of Public Safety, 369 U.S. 153 (1962), this Court wrote:

> "Yet the statute was upheld. Why? Because the 'police power' of a State, especially when exerted for the protection of life and limb, is as pervasive as any of the reserved powers of the States and should be respected unless there is a clear collision with a national law which has the right of way under the Supremacy Clause of Article 6," 369 U.S. at 172.

See also, Patterson v. New York, 432 U.S. 197 at 201-202 (1978).

In Younger v. Harris, 401 U.S. 37, this Court stated:

> "Since the beginning of this country's history Congress has, subject to a few exceptions, manifested a desire to permit state courts to try state cases free from interference by federal courts." 401 U.S. at 43.

See also, Samuels v. Mackell, 401 U.S. 66

(1971); and Huffman v. Pursue, Ltd., 420 U.S. 592, 600 (1975).[15]

That Congress should have manifested this desire should come as no surprise in light of the history set forth in footnote 6, supra.

In National League of Cities v. Usery, 426 U.S. 833 (1976), this Court ruled that state sovereignty and Federalism

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15/ In Younger v. Harris, and in cases arising under 28 U.S.C. 2254, the Federal Courts have to balance the fact that a person may be subject to prosecution or be in custody in violation of an explicit federal constitutional right, versus the possible interference with a state criminal prosecution. Nonetheless, this Court in Younger v. Harris, and Congress by codifying the rule in Ex Parte Royall, supra have both decided that the balance must tip towards respect for state sovereignty. In the instant case, in sharp contrast, there is nothing to counterbalance the state's Tenth Amendment rights. There is simply no constitutional or statutory right to enjoy blatant judicial errors committed in one's behalf, free from review. Therefore, the scales must tip in favor of state's rights on this issue.

considerations precluded Congress from applying minimum wage legislation to state governments:

> "[5] This Court has never doubted that there are limits upon the power of Congress to override state sovereignty. . . In Wirtz, for example, the Court took care to assure the appellants that it had 'ample power to prevent. . . "the utter destruction of the State as a sovereign political entity,"' which they feared. 392 U.S. at 196, 20 L.Ed.2d 1020, 88 S.Ct. 2017.
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> * * *
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> In Fry, supra, the Court recognized that an express declaration of this limitation is found in the Tenth Amendment:
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> 'While the Tenth Amendment has been characterized as a "truism," stating merely that "all is retained which has not been surrendered," United States v. Darby, 312 U.S. 100, 124, [85 L.Ed. 609, 61 S.Ct. 451, 132 A.L.R. 1430] (1941), it is not without significance. The Amendment expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity

> or their ability to function effectively in a federal system.' 421 U.S. at 547 n 7, 44 L.Ed.2d 363, 95 S.Ct. 1792.
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> * * *
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> We have repeatedly recognized that there are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislature authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that manner." 426 U.S. at 842-845.

Petitioner is not asserting that 28 U.S.C. 1442(a)(1) is unconstitutional per se. This Court's prior decisions traced the history of the removal statute and recognized its importance in effectuating the mandate of the Supremacy Clause. Willingham v. Morgan, supra, 395 U.S. at 405-406.

Petitioner does contend that if, as the majority held, Congress did not intend to allow the states the right to appeal in a removal

prosecution, then 28 U.S.C. 1442(a)(1) becomes unconstitutional as applied, because of "overbreadth" problems.[16]

16/ In N.A.A.C.P. v. Alabama, 377 U.S. 288 (1964), this Court stated:

> "This Court has repeatedly held that a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms. See id., at 463-464. '. . . [T]he power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom.' Cantwell v. Connecticut, 310 U.S. 296, 304, 84 L ed 1213, 1218 60 S.Ct. 900, 128 ALR 1352. '. . . [E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.' Shelton v. Tucker, 364 US 479, 488, 5 L ed 2d 231, 237, 81 S Ct 247." 377 U.S. at 307-308.

Petitioner's counsel is aware that the "overbreadth" doctrine has traditionally been applied by this Court when the freedom encroached upon by a statute was protected by the First Amendment. Petitioner submits there is no analytical reason why the same approach should not be applied when the protected freedom encroached upon is the Tenth Amendment freedom of the states to enforce state criminal statutes to protect the life and limb of their residents.[17] This Court recognized ". . . the more compelling state interest in conducting criminal trials in the state courts" in Willingham v. Morgan, supra, 395 U.S. at 409, footnote 4.

17/ The protection of life and limb is even more important in our Constitutional scheme than is the protection of free speech. When speech is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action" speech may be restricted by a state. Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

The purposes the removal statute are suppose to serve are in no way furthered by according removal defendants the special privilege of having judicial errors committed in their favor insulated from review. That is an overly-broad windfall benefit that seriously encroaches on state sovereignty. The removal statute was designed to effectuate the supremacy of the Federal Government by protecting persons acting under color of federal law from state prosecutions for acts performed within the proper scope of their federal authority; Tennessee v. Davis, supra; Colorado v. Symes, 286 U.S. 510 at 517 (1932). It also serves to provide a forum for a defense based on official immunity, free from local bias. Willingham v. Morgan, 395 U.S. 402 at 407 (1969). The statute should not operate to stack the deck against the state government and in favor of the removal defendant.

As this Court stated in Colorado v. Symes, supra:

> "And it is axiomatic that the right of the States consistently with the Constitution and laws of the United States, to make and enforce their own laws is equal to the right of the federal government to exert exclusive and supreme power in the field that by virtue of the Constitution belongs to it. The removal statute under consideration is to be construed with highest regard for such equality. Federal officers and employees are not, merely because they are such, granted immunity from prosecution in state courts for crimes against state law." (Emphasis added) 286 U.S. at 518. See also, State of North Carolina v. Carr, 386 F.2d 129 at 131 (1967).

The removal statute as construed by the majority has the same defect as statutes subject to attack on First Amendment overbreadth grounds.

18 U.S.C. 3731 will also be vulnerable to future constitutional attack on

Fifth Amendment Equal Protection grounds if the majority decision is not reversed.

The majority has ruled that Congress created two distinct classes of criminal defendants in Federal Court: (1) the ordinary federal defendant, who is subject to an appeal by the prosecution pursuant to 18 U.S.C. 3731 to challenge erroneous rulings in favor of the defendant by the District Court; and (2) federal employees entitled to removal under 28 U.S.C. 1442 (a)(1) who now constitute a special privileged class. Congress cannot set up such a statutory scheme consistent with the Equal Protection guarantee that is embodied in the Due Process Clause of the Fifth Amendment. Bolling v. Sharpe, 347 U.S. 491, (1954); c.f., Marshall v. United States, 414 U.S. 417 (1974).

Unless someone can think up a "rational basis" for allowing criminals

who are employed by the Federal Government these special privileges, the Equal Protection rights of the ordinary federal defendant[18] are violated every time the United States Government files an appeal under 18 U.S.C. 3731. Even if some ingenious Justice Department attorney can ascribe some rational basis for sustaining this distinction, this Court should not sustain the majority's Orwellian corruption of one of our oldest and most basic legal principles.[19]

18/ The instant Petitioner obviously lacks standing to bring such an attack on 18 U.S.C. 3731. Numerous inmates in federal prisons and future federal defendants do and will have standing to make such an attack.

19/ In George Orwell's Animal Farm, Harcourt, Brace and Jovanovich, New York, 1946, the Seventh Commandment "All Animals Are Equal" (p. 33) is ultimately altered by the new ruling class to read: "All Animals

Therefore, in order to forestall a potential constitutional attack on these two important statutes, the Court should construe 18 U.S.C. 3731 or 28 U.S.C. 1291 as allowing a state to appeal in a removal prosecution.

Are Equal But Some Are More Equal Than Others" (p. 123). The concept of equal justice under law, inscribed over the entrance to this Court, dates back at least to the time of Moses. See, Exodus 12 § 49 and Numbers 15 § 15-16.

(Parenthetically, Mosaic law also provided for appeals to higher courts. See, Deuteronomy 17 § 8-13).

Petitioner submits that when this Court is trying to ascertain the Congressional intent behind 18 U.S.C. 3731, the Court should not assume that Congress intended to violate this most basic precept of Western law.

E. 28 U.S.C. 1651 PROVIDES THE COURT OF APPEALS WITH JURISDICTION TO CONSIDER PETITIONER'S CONTENTION THAT THE DISTRICT COURT WAS WITHOUT JURISDICTION TO SUA SPONTE ENTER A JUDGMENT OF ACQUITTAL ELEVEN MONTHS AFTER THE JURY FOUND RESPONDENT GUILTY

Judge Kennedy, in his dissent noted:

> "I turn now to the merits of the district court's ruling. As an initial matter, the State argues that the judge lacked jurisdiction to enter a judgment of acquittal because, contrary to the requirements of rule 29(c), the defendant failed to file a proper motion within seven days of the verdict. At least two circuits have held that unless a timely motion is filed, the judge lacks jurisdiction to enter a judgment of acquittal." (Citations omitted) Pet.App. at 30a.

This issue is discussed fully in part II of this brief.

The majority opinion never discussed this contention of the Petitioner since they found they were "without jurisdiction to entertain this appeal" (Pet. App. at 11a). The Petitioner did not formally request the Court of Appeals to issue a Writ of Mandamus, it being the position of the Petitioner in this Court and in the Court of Appeals that the Petitioner has the right to a full appeal,[19a] challenging the merits

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19a/ Petitioner concedes that the weight of authority is that Mandamus does not lie as a substitute for an appeal, and that Mandamus would not be the proper procedural device for challenging the merits, as opposed to the jurisdiction of the District Court's order acquitting Respondent. Will v. United States, 389 U.S. 90 at 96-97 (1967). The Will Court went on to say, however:

> "This is not to say that mandamus may never be used to review procedural orders in criminal cases. It has been invoked successfully where the action of the trial court totally deprived the Government of its right to initiate a prosecution. Ex parte United

of the District Court's order granting the Judgment Of Acquittal, as well as challenging the District Court's jurisdiction to even enter such order.

The Court of Appeals, and this Court have jurisdiction to consider the issue discussed in part II infra by construing the Petitioner's appeal as a Petition for a Writ of Mandamus pursuant to 28 U.S.C. 1651. It is the substance, and not the label of pleadings that are controlling. Hill v. United States, 368 U.S. 424 at 430 (1962); Martenay v. United States,

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States, 287 U.S. 241 (1932), and where the Court overreached its judicial power to deny the Government the rightful fruits of a valid conviction, Ex parte United States, 242 U.S. 27 (1916)." (Emphasis added) 389 U.S. at 97-98.

216 F.2d 760 at 762 (1954); Scarponi v. United States, 313 F.2d 950 at 952 (1963); United States v. Rosenson, 291 F.Supp. 867 at 869 (1968).

In United States v. Denson, 603 F.2d 1143 (1979), the En Banc Fifth Circuit held that:

> ". . . we hold that when the writ of mandamus is sought from an appellate court to confine a trial court to a lawful exercise of its prescribed authority, the court should issue the writ almost as a matter of course." 603 F.2d at 1145.[20]

In Maryland v. Soper, (No. 1) 270 U.S. 9 (1925), this Court stated:

20/ United States v. Denson, discusses and reviews at length many of this Court's prior decisions in respect to the use of Mandamus in arriving at its holding.

> "In respect of the removal of state prosecutions, there should be a more liberal use of mandamus than in a removal of civil cases. . ." 270 U.S. at 29.

See also, United States v. Smith, 331 U.S. 469 (1947) where this Court issued a Writ of Mandamus to vacate a trial court's untimely grant of a new trial when the trial court had no jurisdiction to do so under Rule 33; United States v. Weinstein, 452 F.2d 704 (1971).

Petitioner submits that even if this Court agrees with the majority that a state government has no right to appeal in a removal prosecution, for the reasons set forth in part II of this brief, the District Court had no lawful authority to enter the Judgment Of Acquittal and "over-reached its judicial power to deny the

Government the rightful fruits of a valid conviction." Will v. United States, supra.

Therefore, even if the Petitioner is held to have no right to a formal appeal, the Court of Appeals should have, and this Court should now exercise its Mandamus jurisdiction and its duty to supervise the actions of the lower court by setting aside the Judgment Of Acquittal and ordering the District Court to reinstate the verdict. La Buy v. Howes Leather Company, 352 U.S. 259 at 259-260 (1957).

II.

THE DISTRICT COURT HAD NO JURISDICTION TO SUA SPONTE ORDER A JUDGMENT OF ACQUITTAL ELEVEN MONTHS AFTER A JURY CONVICTED RESPONDENT

Rule 29(c) of the Federal Rules of Criminal Procedure allows a defendant to make a Judgment Of Acquittal motion within seven days after the jury is discharged or within such further time as the Court may fix during the seven day period. Every lower Federal Court that has considered this issue has held that unless a timely motion is filed or extension of time is granted within the seven day limit, the District Court loses jurisdiction to consider such motion.[22]

22/ United States v. Johnson, 487 F.2d 1316 at 1321 (5th Cir.), cert. denied, 419 U.S. 825 (1974); Rowlette v. United States, 392 F.2d 437 at 439 (10th Cir. 1968); United States v. Beran, 546 F.2d 1316 (10th Cir. 1976), cert. denied, 430 U.S. 916; United States v. Homer, 411 F.Supp. 972 at 975,

In the instant case, Respondent was convicted by a jury on November 6, 1976. Respondent did file a timely Motion For A New Trial pursuant to Rule 33 and a timely Motion For Arrest Of Judgment pursuant to Rule 34. Respondent moved for a Judgment Of Acquittal after the close of the state's case (Tr. 132-3); and after the close of all the evidence (Tr. 348). Both motions were denied at that time by the District Court (Tr. 133 and minute entry of November 5, 1976, document 19 of the record on appeal). Respondent never filed a Motion For Judgment Of Acquittal pursuant to Rule 29(c) after the guilty verdict was returned, and never requested an extension of time to file such motion. Neither of Respondent's post-trial motions alleged insufficiency of the

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affirmed on other grounds, 545 F.2d 864 (3rd Cir. 1976), cert. denied, 431 U.S. 954 (1977); United States v. Laurelli, 187 F.Supp. 30; United States v. Kane, 319 F.Supp. 527.

evidence as a ground for granting said motion.[23]

The District Court granted Respondent's Motion For Arrest Of Judgment on November 30, 1976, 24 days after the jury's verdict.[24] On December 6, 1976, the

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23/ Respondent's new trial motion filed November 15, 1976, was based on the alleged failure of the prosecution to disclose a statement of Respondent's that was used against him at trial and also on the ground that the Court should not have instructed the jury that a loaded gun is a deadly weapon as a matter of law. Respondent's Motion For Arrest Of Judgment was also filed November 15, 1976 and was based on Respondent's theory that the State of Arizona lacked jurisdiction to prosecute him in the first instance. This was discussed at length in the District Court's opinion (Pet.App. at 41a-50a). Both of Respondent's motions are reproduced in the Appendix at pages 5 through 16.

24/ Thus Respondent's failure to file a timely Rule 29(c) motion cannot be ascribed to Respondent's detrimental reliance on the District Court having obviated the need for such motion by granting the Respondent's Motion For Arrest Of Judgment.

District Court granted the Petitioner's Motion For Reconsideration of its ruling Arresting Judgment. Nothing further happened on the case until Repondent filed a Motion For A Status Hearing, which was held on September 26, 1977. It is noteworthy that the record of this Status Hearing does not reflect any mention by either Respondent's counsel or by the District Court that a Judgment Of Acquittal was requested by Respondent, or even within the Court's contemplation at this time. In fact, the Court stated: "I don't feel there is any need for additional briefing. . ." (Transcript of September 26, p. page 4). No transcripts of Respondent's trial were in existence at this time. The District Court's decision was based on the District Court's eleven month old and completely erroneous recollection of what had occurred at trial.[25]

25/ As Judge Kennedy, the only Judge who reached the merits of the Petitioner

The District Court, under the erroneous belief it had failed to properly

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appeal noted in his dissent:

> "The court's ruling was based on the premise that the evidence was insufficient to overcome a defense of immunity under Clifton v. Cox, supra. The defense of immunity was not raised or argued at all at trial. The defendant had the burden of raising immunity as an affirmative defense but did not do that.
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> In these circumstances the government cannot be faulted for failing to prove that grounds for immunity were not present. It makes no sense to apply a test of insufficiency of the evidence to a defense not raised at trial and pertaining to a subject that the Government did not have the duty to open." (Pet.App. 31a-32a)

Judge Kennedy went on to point out that even if Respondent had formally raised the defense of immunity at trial, the incriminating evidence introduced by the State at trial was sufficient to overcome such defense, and that the Judgment Of Acquittal was improper in any event (Pet.App. 32a-34a). Indeed, the District Court's ruling on this issue takes on a truely Kafkaesque quality when one reads the following statement by Respondent's counsel (Mr. Whitney) the day

instruct the jury on the immunity defense that was never presented, attempted to justify the untimely sua sponte entry of the Judgment

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prior to trial. This was in response to the prosecutor's (Mr. Lingeman) request that potential jurors be voir dired as to their feeling about a possible immunity defense:

> "MR. WHITNEY: If it please the Court, I would like, while we're here and Mr. Lingeman is here, Mr. Lingeman has indicated to me that he will ask the jury concerning the question of whether or not they feel one apprehending a misdemeanant has the right, as an officer, to commit an assault. Our position in this trial, Your Honor, is that no assault was intended, and we will not intend to use that as a defense. Our position will be that there was in fact an accident and we will offer testimony to that effect. (Transcript of Motion To Dismiss, November 3, 1976, p. 18)

Respondent never requested a jury instruction on any type of immunity defense. (Document 16 of the record on appeal, Respondent-Defendant MANYPENNY'S Requested Jury Instruction, filed November 3, 1976; and see Trial Transcript p. 346.

Of Acquittal by stating: ". . . this Court will consider the motion for arrest of judgment as a motion under Rule 29(c) for judgment of acquittal." (Pet.App. 56a)

The sole ground for granting a Judgment Of Acquittal is the insufficiency of the Government's case. United States v. Cohen, 445 F.Supp. 843, affirmed, 594 F.2d 855, cert. denied, 99 S.Ct. 2169. An error in instructing the jury is not a ground for granting a Judgment Of Acquittal. United States v. Rivers, 406 F.Supp. 709, affirmed at 544 F.2d 513.

As noted in Argument E, supra on issue I, it is the substance and not the form of the pleadings that are controlling. If Respondent's timely Motion For Arrest Of Judgment or Respondent's timely new trial motion had attacked the sufficiency

of the evidence presented in the State's case, the District Court could have properly construed those motions as a Rule 29(c) motion and would have had jurisdiction to have granted said motion.[26] United States v. Forrest, 434 F.Supp. 1131, affirmed, 573 F.2d 1302; United States v. Gibbons, 437 F.Supp. 650, affirmed, 588 F.2d 824; United States v. Beran, supra, 546 F.2d 1316. As already noted, the sufficiency of the evidence of the State's case was not attacked or alleged in either post trial motion.

In United States v. Smith, supra, 331 U.S. 469 (1947), the defendant had filed a timely motion for new trial pursuant

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26/ The granting of said motion would still have been error on this record as Judge Kennedy noted. The substantive merits, or lack thereof of the District Court's order are not before this Court and will not be argued by Petitioner.

to Rule 33. The District Court denied the defendant's motion and after the defendant's conviction was affirmed by an Appeals Court, the Federal District Court sua sponte ordered a new trial. This Court held the time limit set forth in the Rules was jurisdictional, and granted the Government's Petition For Writ Of Mandamus to vacate the new trial order.[27]

27/ This Court stated per Justice Jackson:

> "Briefly, Judge Smith thought and intervenor argues that the rule prevents a defendant from asking the court to grant a new trial after the times specified, but that it permits the judge to order retrial without request and at any time. The result, in view of annulment of the term limitation, would be that the power of the trial court to grant new trials on its own motions lingers on indefinately. There are several reasons why this construction of the Rules is not acceptable.

Assuming arguendo this Court views the reference to the Rules in Smith as dicta

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> We think that expiration of the time within which relief can openly be asked of the judge, terminates the time within which it can properly be granted on the court's own initiative.
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> But the extension of that time indefinately is no insurance of justice. On the contrary, as time passes, the peculiar ability which the trial judge has to pass on the fairness of the trial is dissipated as the incidents and nuances of the trial leave his mind to give way to immediate business. It is in the interest of justice that a decision on the propriety of a trial be reached as soon after it has ended as is possible, and that decision be not deferred until the trial's story has taken on the uncertainty and dimness of things long past." 331 U.S. at 473-476. (Emphasis added)

Smith is distinguishable from the instant case in that the defendant in the Smith case already had his conviction affirmed

rather than holding as to Rule 29(c) motions, Petitioner submits the Smith Rule should be extended to Rule 29(c) motions.

Rule 29(a) mandates[28] that the court enter a Judgment Of Acquittal on

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by an Appeals Court prior to the entry of the new trial order. In the instant case, jurisdiction had not shifted to the Court of Appeals at the time the District Court entered the untimely Judgment Of Acquittal. That factor was considered and discussed by the Court in reaching its decision in Smith. Nonetheless, Petitioner submits that the reasoning advanced in the quoted portion of the Smith case is equally applicable to the instant case.

28/ Rule 29(a) which controls Motions For Judgments Of Acquittal prior to submission of the case to the jury, reads in relevant part:

> "The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses." (Emphasis added)

its own motion or on motion of a defendant if the evidence is insufficient to sustain a conviction. If the rule is followed and properly applied, there is no need to allow a District Court the power to enter a Judgment Of Acquittal months down the line. In the rare case where a Court believes it has made a mistake in failing to grant the Judgment Of Acquittal, and the seven days time limit has expired, the District Court can do justice by granting the defendant a stay of imprisonment pending appeal pursuant to Rule 38 of the Federal Rules

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By contrast, Rule 29(c) which controls Judgment Of Acquittal Motions made after submission of the case to the jury, does not use mandatory language and does not speak to the Court's power to enter such motion sua sponte as does Rule 29(a):

> "If a verdict of guilty is rendered the court may on such motion set aside the verdict and enter judgment of acquittal." (Emphasis added)

of Criminal Procedure. If the reviewing court, after reading the transcripts, agrees that the evidence was insufficient as a matter of law, then the Appellate Court can reverse the defendant's conviction and direct that a Judgment Of Acquittal be entered.[29] When, as here, the District Court is reviewing a jury's verdict, the District Court sits as a reviewing court, not as the finder of fact. The standard of review to be applied by the Federal District Court and Federal Appeals Court is identical when the jury is the fact-finder. Burks v. United States, 437 U.S. 1 at 16-17 (1978); Jackson v.

29/ If a reviewing court determines that the evidence introduced at trial was insufficient, the proper remedy is the entry of a Judgment Of Acquittal and not a remand for a new trial. The double jeopardy clause precludes a new trial when reversal is predicated on insufficient evidence. Burks v. United States, 437 U.S. 1 (1978).

Virginia, 61 L.Ed. 560 at 573 (1979); United States v. Anderson, 532 F.2d 1218 at 1223 (1976). Therefore, a defendant is not subjected to a more stringent standard of review if an Appeals Court passes on his sufficiency of the evidence claim.[30] Furthermore, assuming that the defendant did not timely file an appeal or failed to raise the issue of sufficiency of evidence on appeal, a federal prisoner could still obtain the same relief by filing a Petition For Writ Of Habeas Corpus pursuant to 28 U.S.C. 2241.

30/ This is in sharp contrast to the Rule 33 Motion before the Court in the Smith case. The scope of appellate review from the denial of a new trial motion is narrow. The denial of a motion for a new trial will not be reversed on appeal absent an abuse of discretion by the District Court. United States v. Hamilton, 559 F.2d 1370; United States v. Granger, 504 F.2d 585; Osborne v. United States, 351 F.2d 111; United States v. Carlson, 423 F.2d 431, cert.denied, 400 847; United States v. Wade, 467 F.2d 1226, cert.denied, 410 U.S. 933.

Therefore, by adopting the holding of the Fifth and Tenth Circuits on this issue, the Court would not bar anyone, including the instant Respondent, from obtaining appropriate relief. The Court will assure that in the future "the uncertainty and dimness of things long past" (Smith, supra, 331 U.S. at 276) do not result in erroneous rulings. Rule 29(c) does not allow, and should not allow, a court to review the sufficiency of the evidence in a trial that took place eleven months previous, without the benefit of a set of transcripts.[31]

31/ "The palest ink is a more reliable record than the best memory." - Oriental proverb. Transcripts are necessary to adequate appellate review. See, Griffin v. Illinois, 351 U.S. 12 (1956). As noted supra, the same District Court that entered this Judgment Of Acquittal sua sponte denied two motions for Judgment Of Acquittal during trial when the evidence was fresh in his mind.

CONCLUSION

The judgment of the Court of Appeals should be reversed and the guilty verdict should be reinstated.

Respectfully submitted this 23rd day of May, 1980.

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PIMA COUNTY ATTORNEY

By Daniel Jesse Smith
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HISTORY OF "THE ACT FOR THE IMPARTIAL ADMINISTRATION OF JUSTICE"

British anger at the Boston Tea Party resulted in a series of acts being introduced into Parliament by the British Cabinet. On March 14, 1774, Lord North introduced the first of these, the Boston Port Bill, which passed Commons March 24, 1774 and Lords March 30, 1774 and was signed into law on March 31 by King George, III, closing the Port of Boston.

The Port Act was followed rapidly by the Massachusetts Government Act, designed to "take the executive power from the hands of the democratic part of Government", according to Lord North, because there was "too much democracy in Massachusetts". On the same day that Lord North presented the Government Act, he moved, in a voice that "trembled and faltered at every word", for permission to bring in a "Bill for the Impartial Administration of Justice" in Massachusetts. 14 Geo. III Ch. 39 (1774).

The Bill introduced into Parliament was, like the Quartering Act introduced the same day, the result of the appointment of General Thomas Gage as governor of Massachusetts. Gage was of the opinion that it was hard for British soldiers to get justice from Massachusetts juries and magistrates. Although he could cite no precedent, and despite the fact that all the British troops tried for their part in the Boston Massacre were acquitted by a Boston jury, Gage contended that soldiers doing their duty in suppressing a riot would be in very great danger of being

charged with a capitol crime and hanged by a Massachusetts court. Lord North responded to this contention with the "Bill for the Impartial Administration of Justice". Introduction of this Bill into the same Parliament which had passed, without division the Port Act, touched off instant and vehement debate.

When Lord North finally brought in the Justice Bill, there was a bare quorum in Parliament. John Sawbridge accused Lord North of a cowardly attempt to enslave America by sneaking the Bill before a thin House. Nonetheless, the Bill went through its reading and overwhelmingly passed Commons on May 6, 1774. The Bill passed the House of Lords with little more difficulty May 18, although eight persons signed a protest against it. It was signed into law along with the Government Act.

The "murder act" quickly became one of the most decried of the "intolerable acts" by which the British government attempted to suppress the growing revolutionary sentiment in America. Along with the Quartering Act and the Government Act, the Justice Act was denounced repeatedly in the tracts and broadsides of the period, and was bitterly criticized in the Declaration and Resolves issued by the Virginia Convention and Declaration and Resolves of both the First and Second Continental Congress.

Authority - N. Stout, The Perfect Crisis, The Beginning Of The Revolutionary War, New York University Press, New York, 1976, P. 22-48

respondent's

brief

79-621

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ON WRIT OF CERTIORARI TO THE
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BRIEF FOR WILLIAM DALE MANYPENNY

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INDEX

	Page
Statement	1
Summary of Argument	
I	5
II	7
Argument I	9
THE STATE OF ARIZONA HAS NO RIGHT OF REVIEW UNDER 18 USC 1291 OR THE EXTRAORDINARY WRITS, FEDERAL OR STATE . . .	9
A. §1291 OF 28 USC HAS CONSISTENTLY BEEN HELD TO BE INAPPLICABLE TO FINAL CRIMINAL JUDGMENT AND DECISIONS	32
B. THE TENTH AMENDMENT DOES NOT FURNISH THE STATE OF ARIZONA A LEGITIMATE MEANS OF ATTACKING 18 USC 1291.	45
C. THE STATE OF ARIZONA CANNOT EMPLOY THE EQUAL PROTECTION CLAUSE OF THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION TO ATTACK 18 USC 3731 . .	51
Argument II.	53
THE QUESTION OF FEDERAL SUPREMACY WAS CORRECTLY RAISED BY THE RESPONDENT IN MOTIONS TO DISMISS AND MOTIONS FOR JUDGMENT OF ACQUITTAL . .	53

A. WHERE A JURISDICTIONAL DEFECT IS NOT APPARENT ON THE RECORD, A MOTION FOR JUDGMENT OF ACQUITTAL IS THE PROPER METHOD OF TESTING THE JURISDICTIONAL DEFECT, NOT A MOTION IN ARREST OF JUDGMENT. THE COURT WILL LOOK TO FORM NOT SUBSTANCE . . 59

CONCLUSION. 64

CITATIONS

Cases — Page

Alabama State Federation of Labor v. McAdory, 325 US 450 (1945) 51

Allen v. Board of Elections, 393 US 544 (1969) 48

American Iron and Steel Institute v. E.P.A., 560 F.2d 589 (CA3-1977) 27

Best v. United States, 573 F.2d 1095 (CA9-1978) 15

Brown v. Cain, 56 F.Supp. 56 (D.C. Pa. - 1944) 57, 58

Cardinale v. Louisiana, 394 US 437 (1969) 21, 30

Carroll v. United States, 354 US 394 (1956) 34, 35, 36, 40, 41, 42, 43, 44

Case v. Bowles, 327 US 92 (1946) 7, 48

Charles C. Steward Machine Co. v. Davis, 301 US 548 (1937) 47

Clifton v. Cox, 549 F.2d 722 (CA9-1977) . . . 55, 56

Colorado v. Symes, 286 US 510 (1932) 49

Cases Page

DiBella v. U.S.,
369 US 121 (1962) 34, 35, 36, 37, 42

Ex Parte Fahey,
322 US 258 (1947) 6, 22

Fernandez v. Wiener,
326 US 340 (1945) 48

Fisher v. Baker,
203 US 174 (1906) 42

Fleming v. Rhodes,
331 US 100 (1947) 7, 51

Fry v. United States,
421 US 542 (1974) 47, 48

Government of Virgin Islands v. Hamilton,
475 F.2d 529 (CA3-1973) . . . 6, 15, 16, 37, 38, 40

Harris v. Nelson,
394 US 286 (1969) 42

Hazel-Atlas Co. v. Hartford Co.,
322 US 238 (1940) 27

In re Grand Jury Empanelled February 14, 1978,
597 F.2d 851 (CA3-1979) 43

In re Turpentine and Rasin Factors,
238 F.2d 458 (CA1-1956) 22

Kappens Co. v. Continental Casualty Co.,
337 F.2d 499 (CA8-1964) 20

Cases Page

Ludington Lumber Co. v. Metropolitan National Bank, 55 F.2d 169 (CA7-1931) 28

Maryland v. Soper (No. 1), 270 US 9 (1925) 22, 24, 64, 66

Maryland v. Wirtz, 392 US 183 (1968) 48, 52

Massachusetts v. Mellon, 262 US 477 (1923) 51

Oklahoma v. United States Civil Service Commission, 330 US 127 (1947) 47

Rivera v. Government of Virgin Islands, 375 F.2d 988 (CA3-1967) 39

Rogers v. Loether, 467 F.2d 1110(CA7-1972) 48

Rosenthal v. New York, 226 US 260 (1912) 51

Schlanger v. Seamans, 401 US 487 (1971) 42

South Carolina v. Katzezbach, 383 US 301 (1966) 48

Sperry v. Florida, 373 US 399 (1963) 49

State v. Fayle, 114 Ariz. 219, 560 P.2d 113 (1976) 18

Cases Page

State v. Gasonette,
95 Ariz. 234, 388 P.2d 139
(1972) 19

State v. Lopez,
560 P.2d 113,
144 . . . . . 18, 19

State v. Manypenny,
608 F.2d 1197 (CA9-1979) . . 5, 11,
13, 15,
53, 57

State v. Whitney,
108 Ariz. 277, 496 P.2d
138 (1972) 19

Tennessee v. Davis,
100 US 257 (1879). 14, 49,
64

Umbriaco v. United States,
258 F.2d 625 (CA9-1958). 37

United States v. Beck,
438 F.2d 203 (CA3-1973). 36

United States v. Burroughs,
289 US 159 (1933). 34

United States v. Darby,
312 US 100 (1940) 45, 46

United States v. Daniel,
6 Wheat (US) 542 (1821). 59

United States ex rel Drury v.
Lewis,
200 US 1 (1906). 55

Cases Page

United States v. Green,
350 US 415 (1955) 59

United States v. Hines,
419 F.2d 173 (CA10-1970) . . . 5, 10, 37

United States v. Jaramillo,
510 F.2d 808 (CA9-1975) 36

United States v. Jenkins,
420 US 358 (1975) 36

United States v. Martin Linen Supply Co.,
403 US 564 (1977) 36

United States v. Nardolillo,
252 F.2d 744 (CA1-1958) 41

United States v. Sanford,
429 US 14 (1976) 21, 30

United States v. Sanges,
144 US 310 (189?) 6, 32, 33, 35

United States v. Sisson,
399 US 267 (1970) 36, 59, 61

United States v. Wilson,
420 US 332 (1975) 24, 36

Vermont v. Brinegar,
379 F.Supp. 606 (D. Vt. 1974) . . 47

Virginia v. Paul,
148 US 107 (1893) 22

Cases Page

Will v. United States,
389 US 90 (1967). 36, 37

Willingham v. Morgan,
395 US 402 (1969). 49

Statutes, Constitutional Provisions and Rules — Page

United States:

Art. 3, §1. 48

Fifth Amendment 6

Tenth Amendment 6, 7

18 USC 43 . . . . . .

18 USC 921. 12

18 USC 3731 . . . . . 7, 9, 10, 12, 20, 36, 37, 39, 51, 61, 62, 64, 66

28 USC 1291 . . . . . 16, 32, 35, 36, 37, 38, 39, 40, 42, 43, 44, 65

28 USC 1442 . . . . . 13, 48

28 USC 1450 12

28 USC 1651 21

28 USC 2254 42

28 USC 2255 42

Rule 29, FRCrP. 62

State of Arizona:

A.R.S. §13-1711 17

A.R.S. §13-1712 . . . . . 5, 17, 18, 19

STATEMENT

Although the Petitioner would persuade this Court that the principal question is legal and deals with the Petitioner's right of appeal under U.S.C. 3731, the Petitioner's Brief on the merits contains five pages of argument reciting facts favorable only to the Petitioner. Petitioner's Brief, 7-12. The recitation of the facts also conflict with the Petitioner's stance that there were two separate motions, one a Motion in Arrest of Judgment and the other raised sua sponte, A Judgment of Acquittal void because of untimeliness. Petitioner's Brief, 29 et seq.

So that this Court will understand that the Respondent too, has a cause to be stated and the essence of the Motion in Arrest of Judgment was, in fact, a Motion for Judgment of Acquittal.

The other side of the coin is:

1. The Respondent had been stationed for

almost 6 years at the time of the trial.
R. 154-155

2. He was on duty with a probationer, one Hjelle, who had not been following orders and who had been unable to follow orders and had taken action without authorization or without proper reason.
R. 155-159

3. That Respondent had gone with Hjelle at the specific request of his superior, Wilbur E. Kenney, because of Hjelle's inability to follow directions, Respondent had been specifically requested to take Mr. Hjelle on that assignment and his main duty would be to protect the trainee (Hjelle) and himself.
R. 304-305

4. Prior to the incident in question, Hjelle had lost contact with the Respondent and had wandered into camp with three aliens rather than coordinating with the Respondent to prevent any danger to himself.

R. 158-159

5. In the apprehension of the aliens out of which this incident arose, Hjelle was stationed in a position to block the aliens but heard only Spanish words for "stop" and the English words for "cut" and "Bill" (Manypenny's first name).

R. 169-170

6. When these words were spoken Manypenny believed Hjelle had been "jumped" and was in trouble.

R. 170

7. At this time, Respondent fired his shotgun into the air attempting to divert the illegal's attention.

R. 170

8. Prior to this occasion Manypenny had seen and heard of many incidents of aliens carrying knives and guns and of a person being murdered by an alien.

R. 162-166

9. In fact, knives seized from aliens by the Respondent were introduced into evidence.

R. 237-239

10. The Respondent further testified that of the approximately 5600 aliens he had apprehended, one-third or more carried some sort of knife or weapon.

R. 238

11. Respondent did not at anytime state that he was trying to kill or injure anyone but rather to apprehend them.

R. 241

12. Mr. Hjelle further testified that he did yell and did state the words as Manypenny had indicated.

R. 285

SUMMARY OF ARGUMENT

1. The State of Arizona has no right of appeal and therefore cannot be stripped of its rights in the federal judiciary system. The right of appeal is a matter of express federal statutory prerogative and has not been provided by Congress. United States v. Hines, 419 F.2d 173 (CA10-1970). The cases are clear that in the absence of this authority a right may not be created by the recitation of legislative history that was intended to liberalize federal appellate practice. State v. Manypenny, 608 F.2d 1197 (CA9-1979).

No right exists for appellate relief in the state of origin of this case and a premium should not be placed upon the right of a federal officer to exercise his rights under the removal statute. Arizona Revised Statutes, §13-1712. Nor is

there any remedy under mandamus, since such right is reserved for lack of jurisdiction or clear abuse of discretion and is not the equivalent of an appellate review of error. Ex Parte Fahey, 322 US 258 (1947).

The Courts have held by the weight of authority that the provisions of 28 USC §1291 do not encompass a right of appeal in criminal cases. U.S. v. Sanges, 144 US 310 (1892). The absence of the right of express appeal under federal statutes cannot be remedied by the expansive language of 1291 and in the absence of an express, criminal right of appeal, the party is without remedy. Government of Virgin Islands v. Hamilton, 475 F.2d 529 (CA3-1973).

The Fifth and Tenth Amendment arguments are ruses on the part of the Petitioner. The Fifth Amendment is not available to a party who stands to gain or lose nothing by a violation thereof; this should

not accept an argument in which the proponent has no standing. Fleming v. Rhodes 331 US 100 (1947). The Tenth Amendment to the United States Constitution is not available to invade the right of the federal judiciary to control its own system. Case v. Bowles, 327 US 92 (1946).

2. The Court having ruled upon motion in arrest of judgment in 1976 and having retained jurisdiction for purposes of consideration at behest of the state, retained jurisdiction for a further ruling, U.S. v. Smith, 331 US 469 (1947). If, however, the District Court lost jurisdiction of subject matter of this case, the subject matter was lost for all purposes including the court's order setting aside the arrest of judgment. This order in arrest of judgment still stands and the Court should dismiss the entire appeal as being untimely under the provisions of 18 USC §3731. The writ of mandamus is unavailable, since the Court had jurisdiction and acted well within

its discretion. See Argument 1, supra.

I

THE STATE OF ARIZONA HAS NO RIGHT OF REVIEW UNDER 18 U.S.C. 1291 OR THE EXTRAORDINARY WRITS, FEDERAL OR STATE.

The state throughout these proceedings has adamantly expressed its right to appeal under the provisions of 18 U.S.C. 3731. Its Notice of Appeal so states and this position is reiterated in the briefs and pleadings proceeding and its brief on the merits. Notice of Appeal, CR. 163. The Appellant's Reply Brief filed in the Ninth Circuit contended that it was an "erroneous contention" that the state could not avail itself of the provisions of 18 U.S.C. 3731, because although the statute spoke only of the "United States", this is not what Congress intended. Appellant's Reply Brief, 14 et seq.

The Petition for Certiorari take a similar stance, as did a Oppositive Motion to Limit Issues, Pet. 18 et seq. The Oppositive to Motion to Limit Issues states:

> Petitioner's position throughout this litigation has been and remains that the Petitioner has a right to a full-fledged appeal ... Id. 2.

The federal statute provides that the "United States" shall have a right to appeal. 18 U.S.C. 3731. The Courts have held that this provision is the only statutory right of appeal to the United States:

> Indeed, the United States is denied a right of appeal in criminal cases absent express statutory sanction. There is no express authorization in 28 U.S.C. 1291 and the government's only statutory created right of appeal in criminal cases is given by 18 U.S.C. 3731. United States v. Hines, 419 F. 2d 173, 174 (CA. 10-1970).

The statute (18 U.S.C. 3731) does not mention the "several states" or the territories or possessions. In dealing with the failure of Congress to confer a right upon the states, the Ninth Circuit, Choy, J, stated:

> ...it is manifest that Section 3731 is limited by its own terms to appeals by United States as a prosecuting entity.

> The statute authorizes "an appeal by the United States", not an appeal by a state or by "any of the United States." As we have previously stated '(t)he language of a statute is the best and most reliable index of its meaning, and when the language is clear and unequivocal it is determinative of its construction.'" State v. Manypenny, 608 F. 2d 1197, 1199 (1979).

The "United States" as defined is an entity separate and apart from the separate states:

> The term "United States" may be used in any one of several senses, either as the name of a sovereign occupying the position analogous to that of other sovereigns in the family of nations, or as designating the territory over which the sovereignty of the United States extends, or as the collective name of the states which are united by and under the United States. 77 Am. Jur. 2d, United States. 2.

The definition of "state", conversely in the criminal context almost uniformly includes the following:

> The term "state" includes the District of Columbia, the

> Commonwealth of Puerto Rico, and the possessions of the United States (not including the Canal Zone). 18 U.S.C. 921(a)(2).

and in the removal statute:

> For purposes of this Chapter
> (1) the term "State Court" includes the Superior Court of the District of Columbia.
> (2) the term "state" includes the District of Columbia. 28 U.S.C. 1450.

In the absence of any authority that the State of Arizona can fit within the definition of "United States" for purposes of 18 U.S.C. 3731, the Petitioner state relies heavily upon the legislative history of Section 3731 and the intent in the act that the same be liberally construed to justify the implanting of a new purpose in the statute that exists only in Counsel's mind. State's Brief, 37 et seq.

It is a fundamental precept of statutory construction that legislative history will not be employed when:

> The courts may not read into a

> remedial statute something that is not within the manifest intention of the lawmaking body. A liberal construction of a remedial statute does not authorize the court to place such judicial construction upon the language used to effectuate its own conception of right, rather than the legislative intent, or to depart from the plain and obvious meaning of the language used, or to give a forced or unnatural construction thereto. 73 Am. Jur. 2d Statutes, 280.

Judge Choy, in refusing to create a right of appeal by judicial legislation as would the prosecution, stated:

> Nowhere in the legislative history of the various criminal appeals acts does it appear that Congress addressed or even considered appeals by the state in State Prosecutions before the federal courts under 1442...the reports and debates on the issue of such acts indicate that Congress was concerned only with the right of the federal government to appeal in criminal cases. State v. Manypenny, 608 F. 2d 1197, 1199(1979), footnote 4.

That the lack of an appeal may be unjust is probable, but to create from theory a non-existent statutory right is anarchy.

This Court has held that the removal and trial of federal officers is a matter of federal concern. Tennessee v. Davis, 100 U.S. 257, 25 L. Ed. 648(1879). The protection of the integrity of the general government requires that federal substantive law pertains. Id. To permit otherwise, Tennessee v. Davis holds would be be to invite an unfriendly state legislative to destroy the federal government in that area. Id. 25 L. Ed. 648, 651:

> The removal of cases arising under those laws, from State into Federal Courts, is, therefore, no invasion of state domain. On the contrary, a denial of the right of the General Government to remove them, to take charge of and try any case arising under the Constitution or laws of the United States, is a denial of the conceded sovereignty of that government over a subject expressly committed to it.

If the state statute were to provide for an appeal from a judgment of conviction, which it does not, this remedy would be of no avail

since the federal judicial system does not recognize any prosecutorial appeal except by the United States.

The Ninth Circuit held in this action, State v. Manypenny, supra, that the right of appeal is not determined by the existence of a remedy in the state court, since the creation of rights in the sphere of federal interests is a federal perrogative. Id. 1200. In Best v. United States, 573 F. 2d 1095 (CA. 9-1978), written by Judge Choy, the Court held that the fashioning of substantive rights in the federal judiciary was the right of Congress and state statutory remedies could not be incorporated into the federal system as in civil cases. Id. 1101.

An analogus situation arose in Government of Virgin Islands v. Hamilton, 475 F. 2d 529 (CA.3-1973). Before discussing the case it should be noted again that for purposes of

the federal judiciary, the Virgin Islands are considered a state with all the privileges and disabilities of that position:

> The territorial courts are not recognized under the judicial clause of the Constitution, but are legislative courts, and the fact that the judges of the Supreme Court of a territory are appointed by the President does not make the courts they are authorized to hold courts of the United States. 72 Am. Jur. 2d, States, Territories, and Dependencies, §159.

In Hamilton, supra, the conviction of a criminal defendant was reversed by the District Court under a specific federal statute providing for appeals from the Virgin Islands Municipal Court. Id. 530. No provision existed under federal law permitting further appeal. Id. Although the government attempted to appeal under 28 U.S.C. 1291, as in the present case, the Court held that in the absence of specific federal authority for appeal, the federal system would not

countenance a criminal appeal:

> The existence of appellate jurisdiction in a specific federal court over a given type of case is dependent upon authority expressly conferred by statute. Id.

Nowhere has the Petitioner cited any specific federal statute and in its absence, the Petitioner has no right of appeal.

The Arizona Statutes contain no provisions for appealing from a judgment of acquittal. The statutory bases contained in Arizona Revised Statutes (A.R.S.) Sections 13-1711 and 13-1712. The contents of these statutes are:

> The state, or any party to a prosecution by indictment or information, may appeal to the Court of appeals as prescribed by law and in the manner provided by the rules of criminal procedure, except criminal actions involving crimes which a sentence of death or life imprisonment has actually been imposed may only be appealed to the Supreme Court. A.R.S 13-1711.

A.R.S. 13-1712 limits the state's right of appeal. An appeal may be taken by the state from:

1. An order quashing an indictment or information or count thereof.
2. An order granting a new trial.
3. An order arresting judgment.
4. A ruling on a question of law adverse to the state when the defendant was convicted and appeals from the judgment.
5. An order made after judgment affecting the substantial rights of the state.
6. The sentence on the grounds that it is illegal.
7. An order granting a motion to supress the use of evidence.

None of the provisions of A.R.S. 12-1712 provides the State in this cause with an appeal right.

In the absence of such a statutory right, the Arizona Courts have held, as have the federal courts, that no right of appeal exists. State v. Fayle, 114 Ariz. 219, 560 P. 2d 113, (1976). State v. Fayle, supra, is a brief opinion, in essence, adopts the position of State v. Lopez, infra.

State of Arizona v. Lopez, infra, the Court held that an appeal from an order dismissing the prosecution of an action would not

lie. 560 P. 2d 113, 144. The Court in reviewing the dismissal distinguished between the quashing of indictment for legal insufficiency (A.R.S. 13-1712(1)) and the dismissal of a prosecution; the first testing the "basic legal sufficiency" and the latter involving a "violation of speedy trial time limits or for lack of prosecution." Id. 114-115 (Emphasis is the Court's). There being no right of appeal by statute, the appeal would not lie. Id. State v. Gasonette, 95 Ariz. 234, 388, P. 2d. 139, (1972).

> The right of an appeal in criminal cases was unknown to the common law ...It is purely statutory and does not exist in absence of statute... There is no provision either in Arizona's Constitution, by statute or criminal rule which permits an appeal to the Superior Court or to this Court from a denial of a Motion to Dismiss a Criminal Complaint. State v. Whitney, 496 P. 2d. 138-139.

Therefore, in the absence of State statutory or constitutional authority or criminal rule, the State would have no

authority to appeal if a judgment of acquittal had been entered and the case had remained in State Court.

The State obtains no greater right of appeal by reason of the Defendant's removal; if no statutory right exists under State law, none is acquired by removal:

> Removal gives the federal court only derivative jurisdiction. This is no better than that possessed by the state court in which the action was commenced. Thus, if jurisdiction is lacking in the state court in the first instance, it is not brought into being by the removal, even though the Federal Court to which the suit was removed would have had jurisdiction had the action originated there. Kappens Co. v. Continenal Casualty Co., 337 F. 2d 499, 501-502, (CA. 8-1964).

Thus, the Court of Appeals cannot obtain jurisdiction over an appeal barred under State law, even if the Court would have had jurisdiction of a similiar appeal brought in the name of the United States under 18 U.S.C. Section 3731.

The state would further premise its right to review on the federal extraordinary writ of mandamus.

This Court should not denominate as "mandamus" what has been considered an appeal for the past three and one half years, and was raised for the first time as mandamus in the Petition for Certiorari. Id. 45. If the matter can only be resolved under the mandamus statute (28 U.S.C. 1651), the Court should return the matter to the Ninth Circuit to determine if mandamus would lie. Such has been the practice of this Court when faced with matters unresolved by the lower courts. United States v. Sanford, 429 U.S. 14(1976); Cardinale v. Louisiana, 394 U.S. 437(1969).

The writ of mandamus is not the equivalent of the automatic right of review as the state would have us believe; the First Circuit in reviewing the right has held:

> ...we, as does the First Circuit... regard the Writ as extraordinary,

> reserved for rare cases of compelling need and decline, where others might not...its issuance, where on the record presented the matter under scrutiny is or may be use, non-use or mis-use of discretionary power, In re Turpentine & Rasin Factors, 238 F. 2d 458, 459, (CA.1-1956) Citations omitted).

Granted that the First Circuit admitted that other circuits might not be so strict, yet, this Court has held that the writ should issue only in extraordinary and unusual circumstances, not in lieu of an appeal or to review errors of judgment below:

> Mandamus, prohibition and injunction against judges are drastic and extraordinary remedies. We do not doubt power in a proper case to issue such writs. But they have the unfortunate consequences of making the judge a litigant, obliged to obtain personal counsel or to leave his defense to one of the litigants before him. These remedies should be resorted to only where appeal is clearly an inadequate remedy. We are unwilling to utilize them as substitutions for appeal. As extraordinary remedies, they are reserved for really extraordinary causes. Ex parte Fahey, 332 U.S. 258, 259-260 (1947); Virginia v. Paul, 148 U.S. 107 (1893).

Chief Justice Taft in 1925 decided the case of Maryland v. Soper (No. 1), 270 U.S. 9 (1925). Not surprisingly at that time, the case involved revenue agents who held their commission from the Commissioner of Internal Revenue. Id. 27. Although the issue turned upon the question of whether the parties arrested were revenue agents within the meaning of the then removal statute (Section 33 of the Judicial Code), the Court in considering the efficacy of a mandamus proceeding found:

> The state by its petition for mandamus becomes a suitor at the bar of this Court to challenge the legality of the inferior court's action. Conceding the validity of the exceptional use of the national supremacy in a proper use, it seeks this writ to test its propriety here. Except by the issue of mandamus, it is without an opportunity to invoke the decision of this Court upon the issue it would raise. The order of the United States District Judge in refusing to remand is not open to review on a writ of error and a judgment of acquittal in that court is final. Id. 29-30

The clear implication is that in 1924,

the date of the decision, the Chief Justice of this Court recognized the lack of appellate review in the states in a criminal prosecution. Also, at the time, there was an appellate statute which provided limited appellate rights to the federal prosecution. United States v. Wilson, 420 U.S. 332, 336-337, 43 L. Ed. 2d 232(1975). This holding by the Chief Justice is certainly recognition of the state's inability to appeal.

Maryland v. Soper (No. 1), supra, is certainly not authority for the proposition that any case invoking a removal should have ready access to mandamus. The concern of Justice Taft, as is apparent from the language above, was not to grant review by means of mandamus of every alleged defect in a proceeding removed from the state court but to make all assurances that the case was properly removed in the first instance. Id. 30.

Because the case could not be reviewed by appeal, the Court felt that mandamus should be made more liberal to test the jurisdiction of the Court in the removal proceedings. There in no indication in the decision that a review of the basis for an entry of judgment of acquittal would negative traditional standards of mandamus.

The theory for mandamus appears to be that the Court had no right to enter a judgment sua sponte for acquittal, and even if the Court had the ability to enter the judgment, it lost the right through lapse of time. State's Brief, 73 et seq.

The Petitioner does not dispute the fact that it sought reconsideration of the order granting the Motion in Arrest of Judgment (in the opinion of the Respondent a Motion for Judgment of Acquittal, supra). CR. 137. There was therefore a proper order issued in

less than a month, had not the Petitioner sought and received additional consideration. CR. 148-150.

Petitioner cites United States v. Smith, 331 U.S. 469(1947) in support of the proposition that time in post-verdict motions is jurisdictional. One striking difference exists in that Smith reviewed and reconsidered the case on its own initive. Id. 471. In the present case, the Petitioner aggressively moved the Court for rehearing and now objects because the Court retained jurisdiction and vacated its former order. CR. 148 and CR.149.

One of the holdings of the Smith decision was that a motion made by Defendant for new trial, if made during the then five day time interval, may be considered indefinitely for the purpose of mature reflection:

> The trial judge is given power by the Rules to entertain motions for new trial within five days after

> verdict and may extend that time for so long as he thinks necessary for proper consideration of the trial. Id. 475-476. (Emphasis Added)

A reconsideration of a case by the Court and its ability to set aside or recall a judgment has been recognized by this Court even in appellate circumstances. Hazel-Atlas Co. v. Hartford Co., 322 U.S. 238,244, 64 S.Ct. 997, 88 L. Ed. 1250(1940). See also American Iron and Steel Institute v. E.P.A., 560 F. 2d 589 (CA.3-1977). Petitioner's only complaint would seem to be that a reconsideration and setting aside of a judgment, even when requested by the state, is proper only in those cases where the new order or judgment is in its favor.

However, to hold that any action taken on September 28th, 1977 was a nullity is to invite risks, since in the absence of jurisdiction to set aside the order granting the motion in arrest of judgment, the previous order granting the order in arrest of judgment still

exists and the appeal period has expired. On the order in arrest of judgment, the Court should dismiss the appeal as untimely. Ludington Lumber Co. v. Metropolitan National Bank, 55 F. 2d 169 (CA. 7-1931). Although Ludington is a civil case, the principal that a motion must be ruled upon or jurisdiction retained by proper order would appear to be the only analogy to Petitioner's claim of no jurisdiction. If we accept Petitioner's logic the failure to act in a timely manner deprived the District Court of its right to enter a judgment of acquittal in 1977 and the state is deprived of its right to appeal for untimeliness. If the Court has no jurisdiction to enter a judgment of acquittal because of untimeliness, it certainly has no right to set aside its prior order granting an arrest of judgment.

If the judge's actions were untimely and/or without jurisdiction as to the consideration of

the motion for arrest of judgment as a motion for judgment of acquittal, the vacating of the order in arrest of judgment must also be untimely, since the plain import of the order was to permit the entertaining and granting of a motion for judgment of acquittal. The state cannot dissect the opinion to its own benefit, selecting the order for purposes of negativing the order in arrest of judgment and denying to the Court the ability to rule on the judgment of acquittal:

> All parts of an order must be read together, and the order considered as a whole; and, when a court is called on to choose between a construction which gives significance to all clauses of an order and another which makes one of the clauses meaningless, the former is preferred. 60 C.J.S., Motions and Orders, 64, p. 110.

This Court should not denominate as a mandamus what has been considered an appeal for almost three years. There are compelling reasons for such a limitation in this Court. The only issue before this Court is: Was the

Court of Appeals correct in holding that the state has no right of appeal. If this Court should rule that there is a right of appeal, the matter should be remanded to the Court of Appeals for consideration on its merits. This Court has always demonstrated the utmost deference to its lower appellate courts or the courts of the state in not deciding issues unresolved by a lower court. United States v. Sanford, 429 U.S. 14, 50 L. Ed. 2d. 17(1976); Cardinale v. Louisiana, 394 U.S. 437, 22 L. Ed. 398(1969).

If this Court finds that there are no appellate rights, it may remand the case to the Court of Appeals with specific instructions to consider if the substantive and procedural requirements of an extraordinary writ are present. Both parties may brief the issue of extraordinary relief and permit the whole court, not just Judge Kennedy alone, to decide the issues of review under this proceeding.

The Ninth Circuit is capable of determing these issues and judicial restraint and courtesy dictates that the Court of Appeals be allowed to do so.

I(A)

§1291 OF 28 USC HAS CONSISTENTLY BEEN HELD TO BE INAPPLICABLE TO FINAL CRIMINAL JUDGMENT AND DECISIONS

The Solicitor General's brief states (p. 4) there is ". . . no doubt that the language of 28 USC 1291 authorizes the appeal taken in this case." On the contrary, the weight of opinion appears to be that §1291 does not furnish the state of Arizona, or any other capacity, a vehicle for appeal in a criminal case.

In U.S. v. Sanges, 144 US 310 (1892) this Court reviewed at length case law from various jurisdictions and concluded ". . . it is settled by an overwhelming weight of American authority, that the State has no right to sue out a writ of error upon a judgment in favor of the defendant in a criminal case, except under and in accordance with express statutes, whether that judgment was

rendered upon a verdict of acquittal, or upon the determination by the court of a question of law." Sanges, supra, 312. This Court in Sanges also concluded that, generally speaking, English common law would only tolerate a writ of error or new trial in favor of a defendant, not the sovereign. Finding no express authorization in the Judiciary Act of 1891 for an appeal by the United States, this Court cautioned that it was ". . . impossible to pressure an intention on the part of Congress to make so serious and far-reaching an innovation in the criminal jurisprudence of the United States." Sanges, supra, 323.

The Petitioner's brief, like that of the Solicitor General's, seems to indicate that Sanges is an anachronism, a historical curiosity, a unique and short-lived aberration. This is simply not the case. This common law aversion to appeals by

the prosecution in criminal cases has been frequently mentioned in the years subsequent to Sanges. In U.S. v. Burroughs, 289 US 159 (1933) this Court reaffirmed that "In the absence of express statutory authority, no appeal may be taken on behalf of the United States in any criminal case." Burroughs, supra, 161. The Court cited Sanges as authority.

In Carroll v. U.S., 354 US 394 (1956) an appeal by the United States from adverse rulings as to pretrial suppression motions, this Court noted that ". . . in the federal jurisprudence, at least, appeals by the Government in criminal cases are something unusual, exceptional, not favored. The history shows resistance of the Court to the opening of an appellate route for the Government until it was plainly provided by the Congress . . ." Carroll, supra, 400. Morever, in DiBella v. U.S., 369 US 121 (1962) also an appeal

by the United States from adverse rulings on suppression motions, this Court, citing both Sanges and Carroll, specifically mentioned ". . . the historic policy . . . that denies the Government the right of appeal in criminal cases save as expressly authorized by statute." DiBella, supra, 130. Analysis of the proposition that §1291 provides the state of Arizona a vehicle for appeal in the instant case should begin, therefore, with recognition of the axiom that absent specific statutory authorization, no Governmental entity is entitled to a right of appeal.

A brief examination of §1291 reveals that it does not expressly authorize an appeal, even by the United States, in a criminal case. This Court has acknowledged that fact. "No such expression appears in 28 US §1291, and the Government's only right of appeal, given by the Criminal Appeals Act of 1907, 34 Stat 1246,

now 18 USC §3731, is confined to narrowly defined situations . . ." DiBella v. U.S., 369 US 121, 139 (1962). "Government appeal in the federal courts has thus been limited by Congress to narrow categories of orders terminating the prosecution, see 18 USC §3731, and the Criminal Appeals Act is strictly construed against the Government's right of appeal, Carroll v. U.S., . . ." Will v. U.S., 389 US 90, at 96-97 (1967). Repeatedly, §3731 has been recognized as the express statutory authorization for such an appeal, without mention of §1291, and despite the fact this latter statute and its precursors have been long extant. U.S. v. Wilson, supra. U.S. v. Jenkins, 420 US 358 (1975). U.S. v. Sisson, supra. U.S. v. Martin Linen Supply Co., supra. U.S. v. Beck, 438 F2d 203 (CA3 - 1973), cert. den. 414 US 1132 (1974). U.S. v. Jaramillo, 510 F2d 808 (CA9 - 1975).

In U.S. v. Hines, 419 F2d 173 (10th Cir 1969), the United States' attempt to bottom an appeal upon §1291 was expressly rejected. Understandably enough, the court cited DiBella, supra, as authority, and noted that ". . . the Government's only statutorily created right of appeal in criminal cases is given by 18 USCA §3731." Hines, supra, at 174.

The Ninth Circuit in Umbriaco v. U.S., 258 F2d 625, at 626 (CA9 - 1958) unequivocally held "The grant to the Government of the right of appeal is exclusively contained in 18 USCA §3731." The court rejected §1291 as an alternate basis for the United States' appeal.

This Court's decisions in DiBella and Will, supra, in conjunction with the 9th Circuit's Umbriaco opinion, supra, were relied upon by the 3d Circuit in Government of the Virgin Islands v.

Hamilton, 475 F2d 529 (3d Cir 1973). In Virgin Islands the court also rejected §1291 as an appellate vehicle for the United States in criminal cases, concluding that provision ". . . does not provide the statutes authority which the decisions require." Virgin Islands, supra, at 531.

What is even more interesting in Virgin Islands v. Hamilton, supra, is the close parallel between that case and the instant case.

In Hamilton a defendant was convicted of three criminal charges, appealed to the district court of the Virgin Islands, where the convictions were overturned for insufficiency of the evidence. Id. 530. An appeal was attempted to the United States Court of Appeals for the 3d Circuit. Id. 529. The court held that 28 USC §1291 was no more available to a proceeding in the nature of a state

action for a criminal appeal in federal court than to a federal criminal appeal in the absence of express federal authority under 18 USC §3731. Id. 531.

The Virgin Islands do not receive all the benefits of the federal judicial system and are not considered the "United States" for judicial procedures, including appeal. Rivera v. Government of Virgin Islands, 375 F2d 988, 991 (CA3 - 1967) but are considered "states" for judicial appellate purposes.[1] In Rivera the court denied the contention that a failure to indict Rivera by grand jury was a deprivation of his fifth amendment right, the

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[1]The federal statutes traditionally have treated the possessions and territories as states for federal purposes, their definition being ". . . the several states, the District of Columbia, Puerto Rico, the Virgin Islands and Guam." 18 USC §43.

court held:

> In this respect the traditional procedure in the Virgin Islands is in accord with the modern trend to move in the direction of abolishing the grand jury as cumbersome and outmoded. Movement in that direction was made possible by the ruling by the Supreme Court in Hurtado v. People of State of California (citation omitted) that due process of law required of the states by Fourteenth Amendment was not meant to include the institution and procedure of a grand jury in any case. Id. 991. (Emphasis added)

Thus, Rivera's right in the federal court unless expanded by federal statute are the same as the states. Id. Read together with Hamilton, it is thus evident that state appellate rights to appeal cannot be supported by 28 USC §1291 but must be derived from express federal statute.

As the Solicitor General's brief (p. 5) points out, Carroll, supra, does suggest that §1291 may, in some cases, provide a basis for appeal. However,

the court described these instances as "very few", and only where they touched upon matters ". . . found to possess sufficient independence from the main course of the prosecution to warrant treatment as plenary orders . . ." Carroll, supra, at 403. As examples, the court noted orders relating to the amount of bail, motions for the return of seized property and motions to suppress made prior to indictment, in a different district or after dismissal. These instances deal with matters collateral to a criminal prosecution which are independent and seperable from the main plan of prosecution. U.S. v. Nardolillo, 252 F2d 744 (CA1 - 1958). In the case of motions aimed at evidence of property, "Only if the motion is soley for return of property and is in no way tied to a criminal prosecution in esse against the movant can the proceedings be regarded as

independent." DiBella, supra, at 131-132. In Carroll the court specifically rejected the notion that a motion made by an accused after indictment and in the district of trial could fall within the ambit of "independent" orders appealable pursuant to §1291. Carroll, supra, at 404.

The Solicitor General's brief (footnote 6, p. 5) asserts that §1291 does not restrict its application to civil cases, pointing out that the prosecution may appeal from adverse decisions under 28 USC §§2254, 2255. Contrary to the Solicitor General's assertion, habeas corpus proceedings are not "criminal in nature." Habeas corpus proceedings are technically "civil" in nature. Fisher v. Baker, 203 US 174 (1906); Schlanger v. Seamans, 401 US 487 (1971). Of course, this Court has also pointed out that, more properly, habeas corpus proceedings should be viewed as unique. Harris v. Nelson,

394 US 286 (1969). It is simply incorrect, however, to describe them as "criminal".

Even more misleading is the Solicitor General's assertion that grand jury proceedings are appealable under §1291, citing In re Grand Jury Empanelled February 14, 1978, 597 F2d 851 (3d Cir 1979). (footnote 6, p. 5). In that case, the 3d Circuit relied upon §1291 as the basis for an appeal only if grand jury proceedings were not construed to be "criminal proceedings" within the ambit of §3731. Indeed, the court stated ". . . we have no doubt that a grand jury proceeding is a 'criminal proceeding' . . ." Grand Jury, supra, at 857. And as already noted, this Court in Carroll specifically emphasized the necessity for independence from the mainstream of a criminal prosecution before its exception allowing government appeal pursuant

to §1291 will be triggered. The Solicitor General has chosen rather curious authority for the proposition that §1291 is not restricted to civil cases.

As stated by this Court in Carroll, ". . . it is the function of the Congress to decide whether to initiate a departure from the historical pattern of restricted appellate jurisdiction in criminal cases." Clearly, Congress did not choose §1291 as a point of departure.

I(B)

THE TENTH AMENDMENT DOES NOT FURNISH THE STATE OF ARIZONA A LEGITIMATE MEANS OF ATTACKING 18 U.S.C. 1291.

The Tenth Amendment to the United States Constitution states that:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.

In United States v. Darby, 312 U.S. 100, 124(1940), this Court concluded that the Tenth Amendment is "...but a truism that all is retained which has not been surrendered," and that "...nothing in the history of its adoption...suggest(s) that it was more than declaratory of the relationship between the national and state governments as it had been established by the Constitution before the amendment or that its purpose was other than to allay fears that the new national government might seek to exercise powers not granted, and that the states might not be able to exercise fully their reserved powers."

This Court also concluded that the federal government has the authority "...to resort to all means for the exercise of a granted power as are appropriate and plainly adapted to the permitted end." United States v. Darby, supra, 124.

The Tenth Amendment is a curious weapon by which to assail the Congressionally-erected framework of the federal criminal judicial system. It is particularly inappropriate in the instant case, since the "wrong" complained of is the inability of the state to pursue an appeal. As discussed elsewhere in this brief (Section I, supra), the right of the state or federal government to appeal is an extraordinary right, one the common law viewed with disfavor or prohibited. Id.

Such an attitude by the common law made the existence of such right not a matter of custom or usage but a reluctant previlege granted only by statute.

Thus, a statutory right requires a specific statutory authorization which, for whatever reason, Congress has not granted the states in 18 U.S.C. 3731. This case hardly presents an instance which has "...the effect of coercing, destroying or impairing the autonomy of the states." State of Vermont v. Brinegar, 379 F. Supp. 606, 616 (D. Vt. 1974). Charles C. Steward Machine Company v. Davis, 301 U.S. 548 (1937). State of Oklahoma v. United States Civil Service Commission, 330 U.S. 127(1947). Nor is it an exercise of Congressional power "...in a fashion that impairs the States' integrity or their ability to function effectively in a federal system." Fry v. United States, 421 U.S. 542, 547 n. 7. (1974). Interestingly enough, this Court in Fry, cited by the State in support of its argument regarding the Tenth Amendment, Petitioner's brief, pp. 64-65, concluded that wage restriction regulations were "...no such drastic invasion

of state sovereignty." Fry, 547 n. F.

Moreover, the Tenth Amendment cannot be viewed as restricting Congressional activity within a sphere of power delegated to the Federal government. Case v. Bowles, 327 U.S. 92(1946). Fernandez v. Wiener, 326 U.S. 340(1945). Maryland v. Wirtz, 392 U.S. 183(1968). Congress clearly has the power to "ordain and establish" the inferior Federal Courts, Art. 3, 1, UNITED STATES CONSTITUTION, and to regulate the procedures of those courts. Allen v. Board of Elections, 393 U.S. 544 (1969). South Carolina v. Katzezbach, 383 U.S. 301(1966). Granted, this power to prescribe procedures employed by the Federal courts is limited by the Constitution. Rogers v. Loether, 467 F. 2d 1110(7th Cir. 1972), Aff'd 415 U.S. 189(1974). In the instant case, the removal statute, 28 U.S.C. 1442(a)(1), "was designed to effectuate the supremacy of the Federal Government by protecting persons

acting under color of Federal law for State prosecutions for acts performed within the proper scope of their Federal authority...It also serves to provide a Forum for a defense based on official immunity, free from local bias." Petitioner's Brief, p. 68. Tennessee v. Davis, 100 U.S. 257(1880). Colorado v. Symes, 286 U.S. 510(1932). Willingham v. Morgan, 395 U.S. 402(1969). The State of Arizona, in any event, does not contend the statute is unconstitutional per se, Petitioner's Brief, p. 65, but merely unconstitutional as affected by 18 U.S.C. 3731. However, Federal legislation does not contravene the Tenth Amendment merely because it impacts upon a matter concurrently within the interest of the State. Sperry v. Florida, 373 U.S. 379(1963). As suggested, Congress certainly has the right to prescribe procedure within the Federal courts, to include a designation of who may appeal. The Tenth

Amendment cannot, therefore, rectify or remedy Congress' Failure to grant the State a right of appeal within the Federal judicial system.

The Tenth Amendment, as the State of Arizona has attempted to apply it in the instant case, is the proverbial square peg in the round hole. Such a use is simply incompatible with the history and interpretation of the Tenth Amendment.

I(C)

THE STATE OF ARIZONA CANNOT EMPLOY THE EQUAL PROTECTION CLAUSE OF THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION TO ATTACK 18 USC 3731

While "ordinary federal defendant(s)" (Petitioner's Brief, pp. 70-71) all over the nation are no doubt gratified that the State of Arizona has championed their cause, the State clearly lacks standing to raise an equal protection challenge to 18 USC §3731. Fleming v. Rhodes, 331 US 100 (1947) Alabama State Federation of Labor v. McAdory 325 US 450 (1945). Rosenthal v. New York, 226 US 260 (1912). Massachusetts v. Mellon, 262 US 477 (1923).

Indeed, the state has readily conceded this point. Petitioner's Brief, 71, n. 18. This Court should not predicate a decision upon the anticipation of future constitutional challenges by a group not presently in existence which may never press this equal protection argument. There are enough genui

issues to be determined by this court without the necessity of dredging up hypotheticals. As this Court has stated, in a similar vein, "...we decline to be drawn into an abstract discussion of the numerous complex issues that might arise...They are almost impossible and most unnecessary to resolve in advance of particular facts, stated claims, and identified plaintiffs and defendants." Maryland v. Wirtz, 392 U.S. 183, 200(1968).

II

THE QUESTION OF FEDERAL SUPREMACY WAS CORRECTLY RAISED BY THE RESPONDENT IN MOTIONS TO DISMISS AND MOTIONS FOR JUDGMENT OF ACQUITTAL

Both the majority and the dissent have emphasized the fact that immunity was not raised as a defense in the district court. State v. Manypenny, supra, 1199 and 1205.

Apparently, Judge Kennedy to execute the coup de main of this case suggests that the Respondent should have presented an immunity defense as a factual question for the jury:

> I do note that Clifton did not create a new defense. The immunity defense for federal officers has been in existence since In re Neagle, 135 US 1, 10 S.Ct. 658, 34 L.Ct. 55 (1890). Id. 1205.

Even the most cursory inspection of Neagle reveals that the case arose under a writ of habeas corpus to release Neagle from the custody of the county sheriff not

under any trial on the merits: Id. 135 US 1. The decision was based upon the right of the United States to protect its officers from the state intrusive action while in the performance of official federal duties. Id. 75. Nowhere is it suggested that there should be any trial of the whole issue of guilt or innocence, any instructions to the jury or any formal announcement of any defense of immunity. Id. The question was considered to be one of law for the court, not fact for the jury, and asserted that the determination of the right to release was a matter of federal interest:

> To the objection made in argument, that the prisoner is discharged by this writ from the power of the state court to try him for the whole offense, the reply is, that if the prisoner is held in the state court to answer for an act which he was authorized to do by law of the United States, which is was his duty to do as marshal of the United States, and if in doing that act he did no more than

> what was necessary and proper for him to do, he cannot be guilty of a crime under the law of the State of California. When these things are shown, it is established that he is innocent of any crime against the laws of the State, or of any other authority whatever. In Re Neagle, supra, 75.

The Court of Appeals, in speaking of the presentation of the defense of immunity, probably were referring to the case of United States ex rel. Drury v. Lewis, 200 US 1, 26 S.Ct. 229, 50 L.Ed 343 (1906) were the court suggested that a jury question was presented by the defense of immunity. The suggestion made in Drury has found very little acceptance in the years since its pronouncement, most of the cases being determined in the context of a habeas corpus proceeding. Such was the case in Clifton v. Cox, 549 F2d 722 (CA9-1977), the case principally relied upon by Judge Frey, which held that the question of jurisdiction of federal officer was a matter for decision for the court,

not a jury:

> The issue of petitioner's scope of authority presents a question of law which we find was properly resolved by the district court. Id. 726 (Emphasis added)

To the knowledge of this writer, the Ninth Circuit has not held that the question of federal supremacy is a matter for the jury's consideration, Cox rightfully followed Neagle in stating that the federal courts would delineate federal jurisdiction:

> One of the basic tenets in the application of the supremacy clause is that the states have no power to determine the extent of federal authority. To rule otherwise would allow a state to punish the exercise of federal authority under the guise of questioning the right of federal officials to act. Id. 730.

The position that a jury should be permitted to decide the question of federal supremacy and jurisdiction, as suggested by Judge Kennedy, is to suggest that the federal district court abdicate its

function and responsibility to the tender mercies of the jury. Nor is Judge Kennedy correct in his assertion that the failure to seek a jury instruction might ". . . have been a deliberate trial strategem." State v. Manypenny, supra, 1205. The issue of the right of the state to prosecute the Respondent was always treated by him as a legal question and was posed as such throughout the trial of the action.

As was stated in Brown v. Cain, 56 F. Supp. 56 (D.C. Pa. - 1944), the case principally relied upon throughout by the Respondent:

> I have no doubt that a guard in the service of the United States, protecting the plant of a vital war industry, who, in the performance of his duty, does an act for which the state authorities propose to prosecute him, should be half amenable to the law of the United States and to no other. Id. 60.

The issue of immunity may not have been specifically enunciated in the trial of this action. However, the proposition

that the officer was not answerable to the state while performing his duties as an immigration officer, on a federal reservation was the basic thrust of the Motion to Dismiss, CR. 79, filed prior to trial, where after stating the above law from Brown v. Cain, the motion stated:

> The case at bar is even more persuasive for the protection of the officer from state prosecution, since the act in question no (sic.) only was done in furtherance of federal aims but was done federal soil.

The questions of the State's right to act against the Respondent were raised throughout the proceedings, and although the magic word "immunity" was not mouthed, but the concepts of federal supremacy, which is the foundation of any immunity, were certainly presented. See CR. 73-79; CR. 120-125; R 132 & 348.

II(A)

WHERE A JURISDICTIONAL DEFECT IS NOT APPARENT ON THE RECORD, A MOTION FOR JUDGMENT OF ACQUITTAL IS THE PROPER METHOD OF TESTING THE JURISDICTIONAL DEFECT, NOT A MOTION IN ARREST OF JUDGMENT. THE COURT WILL LOOK TO FORM NOT SUBSTANCE.

A motion in arrest of judgment, challenging the jurisdiction of the court, must be based upon only the following matters of record: "...indictment, the plea, the verdict... and the sentence." Cited in Footnote 10, United States v. Sisson, 399 U.S. 267, 281, 26 L. Ed. 2d 608(1970).

If the indictment and other pleadings are sufficient on their face, then the motion in arrest of judgment will not lie and is improper, United States v. Daniel, 6 Wheat. (U.S.) 542, 5 L. Ed. 326(1821); United States v. Green, 350 U.S. 415, 416, 100 L. Ed. 494(1955).

In the present case, there is not doubt that on both occasions i.e. the ruling of November 30th, 1976(CR.137) and September 28th, 1977(CR.156), that the Court ruled upon the

post verdict motions. It was necessary to go beyond the face of the record and inspect the evidence to determine if the State could rightfully try the Respondent. As an example, in order to make its decision on either occasion concerning the ability to try the Respondent on a federal national monument or upon an Indian reservation, the Court had to examine the Attachments to the Motion to Dismiss in the first instance and the testimony of the witnesses as the trial progressed. CR.73. On the question of the Respondent being within the course of his employment and acting in the pursuance of his official duties, testimony had to be heard, since no information could be gleaned from the indictment, the plea, or the verdict. In sum, the importance of evidence considered by the Court, in its resolution of the question of the State's right to try the Respondent, must necessarily be in addition to the record. Since the motion in arrest of

judgment dealt with matters far beyond the face of the record as outlined above, the motion was in effect a motion for judgment of acquittal testing the sufficiency of the evidence and the right of the State to try the Respondent. As stated by this Court in United States v. Sisson, supra:

> For the purpose of this case, the critical requirement is that a judgment can be arrested only on the basis of error appearing "on the face of the record" and not on the basis of proof offered at trial.
>
> . . .
>
> "(A) motion in arrest of judgment can only be maintained for a defect apparent upon the face of the record, and the evidence is no part of the record for this purpose." Id. 281.

In Sisson, supra, the right of the government to appeal from an order granting a motion in arrest of judgment under 18 U.S.C. 3731 depended upon whether in fact the motion was actually one in arrest of judgment or a motion for judgment of acquittal and barred. Id. 289. The court looked beyond the designation of the

record at its implicit characteristics and found that the motion addressed the merits, was ruled upon on the basis of the merits and, thus, suspect under 3731. Id. 290. If this Court looks beyond the categorization of the motion in arrest of judgment and recognizes that the essential nature of the motion is based upon factual material adduced at the trial, there should be no question that the ruling was factual beyond the bare pleadings and the motion was raised and ruled upon in a timely fashion. Rule 29 requires that the motion for judgment of acquittal be brought within seven days and if substance is to prevail over form, the motion was well within the rules.

Additionally, the State has spent five pages of its brief (pp. 7-12) in reciting its version of the facts and argued long and strenuously concerning the nature of land upon which the incident took place and the acts of

the Respondent, none of which appears in the "face of the record" as defined above, see Response to Motion for Arrest of Judgment, App. 19. This prolonged argument unquestionably establishes that the bases of both Court rulings were factual.

CONCLUSION

The attempt has been made in this brief, perhaps inartistically, to demonstrate that if the State is to be taken at its word, i.e. that there is a right of appeal from a judgment of conviction, then this case is not difficult to resolve. There has been a failure upon the part of both Congress and, under one view, the Arizona State Legislature to provide a remedy in this case; particularly is this failure most inexplicable when considered in the light of the rulings in Tennesee v. Davis and Maryland v. Soper (No. 1). Congress need only enact legislation including the "states" within the provisions of 18 U.S.C. 3731 or in appropriate language of the removal statutes to cure this problem. But so long as the cases require an express, statutory right to appeal, the state prosecution will be left without appellate remedy.

Perhaps as equally disturbing is the

State's assertions that the proposition that 28 U.S.C. 1291 provides the State, or even the federal government, a right of appeal in criminal cases. As the case law unequivocally illustrates, 28 U.S.C. 1291 does not provide the clear and specific language necessary to create such a right. And appeal by the State or the United States from a criminal decision is contrary to the common law and may only be constructed by precise legislative action. Even a brief, uncritical examination of 28 U.S.C. 1291 demonstrates that it does not satisfy such a criterion.

The Petitioner, the Solicitor General and the appellate dissent should not ask this Court for judicial legislation to invest the State of Arizona with a right not provided in its own statutes. Nor should this Court accept the responsibility for promulgating a right of appeal based upon the facts that (1) Congress

did not statutorily prohibit a state appeal and (2) the legislative history of 18 U.S.C. 3731 demonstrates an affection for criminal appeal, even though it never mentioned states' appeals.

Because of the language in the Soper decision, supra, which evidences some concern for the right of the state to have redress in the area of removal statute, it must be said in candor that the opinion is unclear if the concern of the Chief Justice centered about the initial act of removal, which directly related to the holding, or that the decisions of the trial court should be granted review, addressed not to clear abuse of discretion but to appellate error. In any event, this Court should not rule upon the correctness of the District Court's ruling but should rather remand the case to the Court of Appeals under traditional standards of comity. This question should not be foistered upon this

Court without review by the Ninth Circuit.

The issues posed by Fifth Amendment Equal Protection argument sought by a party without standing and the simplistic view of the Tenth Amendment will not be dignified by comment in this summary, except to point out that the Court of Appeals was not blessed with either issue and this Court should not consider either.

Respectfully submitted this 23 day of July, 1980.

JAMES D. WHITNEY

AUBREY R. WILLIAMS

CORRECTED COPY

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No. 79-621

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

STATE OF ARIZONA, PETITIONER

v.

WILLIAM DALE MANYPENNY

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

REPLY BRIEF FOR THE STATE OF ARIZONA

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TABLE OF CONTENTS

	Page
Table of Authorities	ii
Reply Argument I	1
THE TENTH AMENDMENT PROVIDES A JURISDICTIONAL BASIS FOR THIS APPEAL	1
Reply Argument II	8
"COMMON LAW" PRINCIPLES FAVOR PETITIONER'S APPEAL	8
Reply Argument III	14
ARIZONA LAW PROVIDES FOR APPELLATE REVIEW OF THE TRIAL COURT'S ORDER IN THE INSTANT CASE.	14
Conclusion	17
Appendix I	18
Letter From Attorney General of California (dated June 9, 1980) authorizing Petitioner to represent to the Court that the State of California supports Petitioner as to the first issue before this Court	19

TABLE OF AUTHORITIES

Cases	Page
Bartkus v. Illinois, 359 U.S. 121	7
Bushell's Case, Vaughan 135, Eng.Rep. 1006	10
Collins v. United Mine Workers of America Welfare and Retirement Fund of 1950, 298 F.Supp. 964.	9
Colorado v. Symes, 286 U.S. 510	11
Davis v. Passman, 442 U.S. 228	1
Elias v. Pasmore, 2 K.B. 164	12
Elrod v. Burns, 427 U.S. 347 (dissenting opinion of Chief Justice Burger)	6, 7
Florida Trailer and Equipment Company v. Deal, 284 F.2d 567	9
Funk v. United States, 290 U.S. 371	8
Glidden Co. v. Zdanok, 370 U.S. 530, (dissenting opinion of Justices Douglas and Black).	10
Miller v. Monsen, 37 N.W.2d 543 (Supreme Court of Minnesota)	8, 11

8345

Cases	Page
O'Donoghue v. United States, 299 U.S. 516	10
Richmond Newspapers, Inc. v. Virginia, ____ U.S. ____, 100 S.Ct. 2814 . . .	1, 2 11, 13
State v. Fayle, 114 Ariz. 219, 560 P.2d 403.	15
State v. Gradillas, 25 Ariz.App. 510, 544 P.2d 1111. . .	14
State v. Lopez, 26 Ariz.App. 559, 550 P.2d 113 . . .	15
Tennessee v. Davis, 100 U.S. 257	11
United States v. Schoenfield, 465 F.2d 560, cert.denied 93 S.Ct. 210.	9
Wolf v. Colorado, 338 U.S. 25.	12
UNITED STATES CONSTITUTION	
Article I, Section III	7
Article II, Section I (superseded by the Twelfth Amendment).	7
Article III.	10
Fourth Amendment	1

837

	Page
Fifth Amendment	1
Eighth Amendment	1
Tenth Amendment	passim
Twelfth Amendment	7
UNITED STATES STATUTES	
18 U.S.C. 3731	6
ARIZONA RULES	
Rule I of the Rules of Procedure For Special Actions (found in Volume 17A of Arizona Revised Statutes)	15
MISCELLANEOUS	
Articles of Confederation	2, 3
The Bible Proverbs § 24, Line 24	13
The Bill of Rights	1
The Declaration of Independence	10
The Federalist, edited by Jacob E. Cooke, Wesleyan University Press(1961)	4
The Federalist, No. 17 (Hamilton)	5, 7
The Federalist, No. 31 (Hamilton)	4
The Federalist, No. 32 (Hamilton)	5

	Page
The Federalist, No. 39 (Madison) . .	5
The Federalist, No. 45 (Madison) . .	5
The Federalist, No. 78 (Hamilton). .	10
The Federalist, No. 79 (Hamilton). .	10
The Federalist, No. 84 (Hamilton). .	5
Brant, The Bill of Rights, Its Origins and Meanings, Bobbs, Merrill and Company (1965)	11
Morison, The Oxford History of the American People, Mentor Edition 1972, Volume 1, pages 399-400. . . .	7
Schwartz, The Bill of Rights; A Documentary History, Chelsea House Publishers (1971).	4
Shakespeare, Measure for Measure, Act II, Scene II, lines 175-176. . .	13

I.

THE TENTH AMENDMENT PROVIDES A JURISDICTIONAL BASIS FOR THIS APPEAL

Respondent on pages 45 through 50 of his brief argues that the Tenth Amendment has no application to this case. Respondent does not explain why this Court cannot imply a remedy under the Tenth Amendment, as it has implied remedies under the Fourth, Fifth (Davis v. Passman, 442 U.S. 228 (1979) at 241, 242) and Eighth Amendments. Respondent apparently contends that the absence of explicit language in the Tenth Amendment authorizing such an appeal by a state precludes the use of the Tenth Amendment as the jurisdictional basis of an implied remedy. Respondent's niggardly reading of the Bill of Rights was most recently rejected by the Court in Chief Justice Burger's opinion in the Richmond Newspapers Inc. v. Virginia case ____ U.S. ____100 S.Ct. 2814 (1980) at 2828-2829.

> ". . .The concerns expressed by Madison and others have thus been resolved; fundamental rights, even though not expressly guaranteed have been recognized by the Court as indispensable to the enjoyment of rights explicitly defined." 100 S.Ct. at 2829.

While there has been relatively little litigation involving the Tenth Amendment, an examination of Constitutional history shows that the Founding Fathers considered the reserved powers doctrine of vital importance to our Constitutional scheme.

Under the Articles of Confederation, the "reserved powers" of the States were seen to embody the whole subject of individual rights. This was made explicit by Article II of the Articles, which provided "Each State retains. . . every power, jurisdiction, and right which is not by this confederation expressly delegated to the United States." This was the

direct precursor of the Tenth Amendment, and was seen as the main bulwark against centralized despotism.[1]

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1. Even when the government system under the Articles began to prove untenable, and a stronger federalism was urged, the reserved powers doctrine retained its pivotal position on the issues of individual freedom and state sovereignty. It was the reserved powers doctrine which proved to be the much needed common ground in the struggle over the Constitution; nearly every anti-federalist writer attacked the absence of a Bill of Rights, specifically rejecting the federalist premise that what rights were not given to the federal government were impliedly reserved to the States. Anti-federalist rejection of this premise lead directly to the adoption of the Tenth Amendment, closely parallelling the old Article II, and soothing anti-federalist fears.

The importance of the reserved powers doctrine to the Founding Fathers is underscored by its treatment by the states. The doctrine was the first of the Twelve Amendments to the Constitution proposed by Massachusetts, the first State to officially propose amendments. It was the first amendment submitted to the Maryland ratifying convention. It was the

(8370

Repeated references to State Sovereignty in the Federalist Papers ineluctably lead to the conclusion that the view of State sovereignty held by the majority in the Ninth Circuit, that the States possess only those rights that Congress deigns to give them, (Pet.App. at 11a) is completely repugnant to the conception of State sovereignty and Federalism held by the Founding Fathers. (All the following quotations are from The Federalist edited by Jacob E. Cooke, Wesleyan University Press, Connecticut 1961.)

> "The State governments by their original constitutions, are invested with complete sovereignty." Federalist No. 31, (Hamilton) pg. 197-198.

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first of the proposed Virginia Amendments. Indeed, every one of the eight States which proposed, either officially or unofficially, amendments to the Constitution, recommended a provision like that ultimately included in the Tenth Amendment, reserving to the States powers not specifically delegated to the Federal Government. See, The Bill of Rights: a Documentary History, by Bernard Schwartz, Chelsea House Publishers, 1971 at 384-5, 505, 674-766, 983.

". . .the State Governments would clearly retain all the rights of sovereignty which they before had and which were not by that act exclusively delegated to the United States." The Federalist No. 32 (Hamilton), pg. 200.

"There is one transcendent advantage belonging to the province of the State governments which alone suffices to place the matter in a clear and satisfactory light. I mean the ordinary administration of criminal and civil justice. This of all others is the most powerful, most universal and most attractive source of popular obedience and attachment." The Federalist No. 17 (Hamilton), pg. 105.

". . .Here, in strictness, the people surrender nothing, and as they retain every thing, they have no need of particular reservations." The Federalist No. 84 (Hamilton), pg. 578. See also, The Federalist Nos. 39 and 45 (Madison).

Petitioner submits, especially in light of the history of colonial hatred for Great Britian's "removal bill" (please see pages 44-47 and 95-96 of Petitioner's opening brief)

§3731

that the majority opinion in the Ninth Circuit in this case would certainly be viewed as antithetical to the Constitution by those who drafted it.

As discussed on pages 37-48 of Petitioner's opening brief, Congress did not intend to preclude appeals by States in removal prosecutions when it enacted 18 U.S.C. 3731. It is Petitioner's position that even if Congress had included a specific subsection explicitly prohibiting the States from using 18 U.S.C. 3731 for appeals in removal cases, such a restriction would be an unconstitutional nullity because of the Tenth Amendment.

If the Court is to "arrest the downgrading of States to a role comparable to the departments of France, governed entirely out of the national capital." (Chief Justice Burger dissenting in Elrod v. Burns, 427 U.S. 347 (1976), at 375) the majority ruling must be

reversed.[2] See also, opinion of Justice Frankfurter in Bartkus v. Illinois, 359 U.S. 121 (1959) at 137.

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2. That the 50 States are to be treated as sovereign political entities is best illustrated by Article II, Section I (superseded by the XII Amendment). It provides that if no presidential candidate wins an outright majority of the electoral votes cast, the House of Representatives shall choose the president, with each of the 50 States to have one vote, irrespective of population. At the time Article II, Section I was adopted, the "two party system" was unforseen and it was assumed that most presidential elections would be decided in the House. See, Morison, The Oxford History of the American People, Mentor edition 1972, Volume I, pages 399-400. C.F. Article I, Section III.

857

II.

"COMMON LAW" PRINCIPLES FAVOR PETITIONER'S APPEAL.

On pages 32 et seq. of his brief, Respondent contends that because English "common law" did not look favorably on appeals by the sovereign in criminal cases, the Ninth Circuit had no jurisdiction to consider the appeal by the instant Petitioner. Respondent misconstrues the nature of the "common law". The "common law" is not graven in stone like the Ten Commandments, it is flexible and has a capacity for growth and change. See, Funk v. United States, 290 U.S. 371 (1933) at 383. The Minnesota Supreme Court wrote in Miller v. Monsen, 37 N.W.2d 543 (1949):

> "Novelty of an asserted right and lack of common-law precedent therefor are no reasons for denying its existence. The common law does not consist of absolute, fixed and inflexible rules, but rather of broad and

> comprehensive principles based on justice, reason, and common sense. It is of judicial origin and promulgation." at page 547.

See also, Florida Trailer and Equipment Company v. Deal, 284 F.2d 567 (5th Circuit, 1960); Collins v. United Mine Workers of America Welfare and Retirement Fund of 1950, 298 F.Supp. 964 (United States District Court for District of Columbia, 1969, affirmed 439 F.2d 494) (quoting Justice Cardozo).

It is immaterial that the instant case is a criminal case rather than a civil case:

> "More significantly, common law doctrines are not frozen for criminal cases any more than civil cases." United States v. Schoenfield, 465 F.2d 560 at 561 cert.denied, 93 S.Ct. 210 (D.C. Cir. 1972).

Moreover, as noted in Petitioner's opening brief at pages 53-54, 47 of the 50 States allow for appeals by the government in criminal

cases, so the "common law" doctrine disfavoring appeals by the sovereign on which Respondent relies clearly has no continuing vitality in the United States.[3]

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3. Respondent's contention that the appellate rights of the State of Arizona in a removal prosecution should be governed by the appellate rights of the English sovereign at common law is even more questionable when one considers the differences in our respective legal systems. English judges did not enjoy the Article III protections that guarantee the independence of our federal judges. Indeed, another enumerated grievance in the Declaration of Independence was: "He has made Judges dependent on his will alone, for the tenure of their offices, and the amount and payment of their salaries." This portion of the Declaration of Independence, as well as Hamilton's Federalist No. 78 and 79, was quoted by the Court when it discussed the importance of the Article III guarantees in maintaining an independent judiciary in O'Donoghue v. United States, 289 U.S. 516 (1933) at 530-533. See also dissenting opinion of Justices Douglas and Black in Glidden Company v. Zdanok, 370 U.S. 530 (1962) at 594-596, quoting Federalist No. 79. In addition to the English sovereign having more influence over the English judiciary, prior to the decision in Bushell's Case in 1670, (Vaughan 135, 124 Eng.Rep. 1006), it was a common practice under Tudor and Stuart monarchs

Petitioner asserts that if this case is to be decided on "common law" principles, than "justice, reason and common sense" (Miller v. Monson, supra) dictate that the Court not divest the States of their right to appeal in a removal prosecution. Allowing for an appeal by the States in removal cases would be consistent with the principles set forth by the Court in Tennessee v. Davis, 100 U.S. 257 (1880) and Colorado v. Symes, 286 U.S. 510 (1932). (Both discussed in Petitioner's opening brief). Further support for Petitioner's position is found in the Court's recent decision in Richmond Newspapers, Inc. v. Virginia, supra. Petitioner submits that all

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to lock up jurors who refused to return a verdict of guilty. See The Bill of Rights, Its Origins and Meanings, by Irving Brant, Bobbs, Merrill & Company, 1965, pg. 61. Moreover, the "exclusionary rule" which forms the basis for a great many government appeals by the Federal Government and various State

of the public policy considerations[4] enumerated by Chief Justice Burger at 100 S.Ct. 2824-26 and Justices Brennan and Marshall in their concurring opinion at 100 S.Ct. 2837-8 that militate in favor of opening the justice system to public scrutiny are equally applicable to the issue of whether a federal district judge should be vested with the unreviewable power to in essence "pardon" any federal official charged with a violation of a State criminal statute.

Petitioner submits that it is hard to think up a rule of law more calculated to subvert the social values enumerated by the

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governments, did not and does not exist in England. See, Wolf v. Colorado, 338 U.S. 25 (1949) Appendix Table J at 39, citing Elias v. Pasmore (1934) 2 K.B. 164.

4. ". . .To work effectively, it is important that society's criminal process 'satisfy the appearance of justice.'" 100 S.Ct. at 2825.

* * *

Court in support of the Richmond decision, than the rule of special privilege established by the majority in the Ninth Circuit.

Open trials assure the public that procedural rights are respected, and that justice is afforded equally. Closed trials breed suspicion of prejudice and arbitrariness, which in turn spawns disrespect for law. 100 S.Ct. at 2837. See also, Shakespeare's, Measure for Measure, Act II, Scene II, soliloquy of Angelo the Magistrate at lines 175-176; Proverbs, § 24, line 24.

III.

ARIZONA LAW PROVIDES FOR APPELLATE REVIEW OF THE TRIAL COURT'S ORDER IN THE INSTANT CASE.

On pages 17 through 20 of his brief, Respondent contends that had Respondent not exercised his right of removal, the State of Arizona could not have sought appellate review of a similar ruling by an Arizona trial judge. Respondent omits any discussion of the case cited by Petitioner in its opening brief, (footnote 2 at pg. 34) and cases cited by Judge Kennedy in his dissent. (Pet.App. 23a, 38a). In those cases, Arizona appellate courts have granted appellate relief via Petition For Special Action when a trial court has improperly entered a judgment of acquittal. See also, State v. Gradillas, 25 Ariz.App. 510, 544 P.2d 1111 (1976) where the State successfully appealed from the granting of both a motion to suppress evidence and a judgment of acquittal.

The Arizona Court of Appeals opinion in State v. Lopez, 26 Ariz.App. 559, 550 P.2d 113 (1976) (majority opinion specifically approved by the Arizona Supreme Court in State v. Fayle, 114 Ariz. 219, 560 P.2d 403 (1976)) on which Respondent relies, specifically rejects Respondent's position.

> "This case, as well as State ex rel Berger v. Superior Court, 111 Ariz. 335, 529 P.2d 686 (1974) indicates that review of an order such as that involved here is available to the State by special action, and, in fact, the non-appealability of the order and the availability of special action proceedings may result in much speedier review of such an order than by means of appeal." 550 P.2d at 115.

Rule 1 of the Rules of Procedure For Special Actions provides that "the special action shall not be available where there is an equally plain, speedy, and adequate remedy by appeal;" (found in Volume 17A, Arizona Revised Statutes, pg. 227-8). That Arizona

denominates appellate review of certain types of orders "appeals" and denominates review of other trial orders "special actions" does not change the reality that in Arizona the trial court's rulings are subject to review by the Arizona appellate courts at the behest of the State.

CONCLUSION

For the reasons set forth in this brief and Petitioner's opening brief, the Court should reinstate the jury's guilty verdict and remand the instant case to the Federal District Court for sentencing.

Respectfully submitted this 2nd day of October, 1980.

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8348

APPENDIX

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June 9, 1980

Honorable Stephen D. Neely
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Attention: D. Jessie Smith
Deputy County Attorney

Re: State of Arizona v. Manypenny
U.S.S.C. No. 79-621

Dear Sir:

You are authorized to represent to the United States Supreme Court that the State of California Supports the position of the State of Arizona on Question I, presented on the Petition in the above entitled case, that the state is not deprived of appellate rights that exist under federal and state law when a state criminal prosecution is removed by a defendant to a federal court pursuant to 28 U.S.C., section 1442(a)(1), and that California joins in Arizona's request that the judgment of the Court of Appeals for the Ninth Circuit, holding to the contrary, be reversed.

A copy of this letter has this date been forwarded to the Honorable Michael Rodak, Clerk of the United States Supreme Court.

Sincerely yours,

George Deukmejian, Attorney General

By William E. James
William E. James
Sr. Assistant Attorney General

WEJ:jd

cc: Honorable Michael Rodak